

ALBERT-LUDWIGS  
UNIVERSITÄT FREIBURG



Memorandum for Claimant

On behalf of  
Mediterraneo Wine Cooperative  
– Claimant –

Against  
Equatoriana Super Markets S.A.  
– Respondent –

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



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



RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German law journal)
Respondent	Equatoriana Super Markets S. A.
RIW	Recht der Internationalen Wirtschaft (German law journal)
SchiedsVZ	Zeitschrift für Schiedsverfahren (German law journal)
S. Ct.	Supreme Court Reporter
StuttgZ	Stuttgarter Zeitung (German newspaper)
sub.	subsection
U. K. Ct. App.	Court of Appeal (United Kingdom)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law ICA	UNCITRAL Model Law on International Commercial Arbitration
U. S.	United States
U. S. Ct. App. (2nd Cir.)	United States Court of Appeals, Second Circuit
U. S. Ct. App. (3rd Cir.)	United States Court of Appeals, Third Circuit
U. S. Dist. Ct. (S. D. N. Y.)	United States District Court, Southern District, New York
v.	versus
Y.B. Com. Arb.	Yearbook of Commercial Arbitration
ZEuP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

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**STATEMENT OF FACTS**

<b>CLAIMANT</b>	Mediterraneo Wine Cooperative [hereinafter “CLAIMANT”] is a producer and distributor of wine. Its principal office is located in Mediterraneo.
<b>RESPONDENT</b>	Equatoriana Super Markets S. A. [hereinafter “RESPONDENT”] is an operator of super markets. Its principal office is located in Equatoriana.
<b>07 May to 01 June 2006</b>	Representatives of the CLAIMANT and the RESPONDENT initiate negotiations concerning the purchase of Blue Hills 2005 at the Durhan Wine Fair.
<b>11 June 2006</b>	The CLAIMANT receives a purchase offer for 20,000 cases of Blue Hills 2005, to be accepted until 21 June 2006. The contract includes the JAMS Model Arbitration Clause. Ms Kringle (assistant to Mr Cox, sales manager for the CLAIMANT) informs Mr Wolf (wine buyer for the RESPONDENT) of Mr Cox’ absence from office until 19 June 2006. Mr Wolf reaffirms the importance of an immediate response.
<b>16 and 17 June 2006</b>	Newspaper articles are published in Equatoriana, alleging the use of anti-freeze in the production of Blue Hills 2005.
<b>19 June 2006 (morning)</b>	The CLAIMANT dispatches its acceptance of the purchase offer.
<b>19 June 2006 (afternoon)</b>	The CLAIMANT receives an e-mail which aims at revoking the purchase offer.
<b>20 June 2006</b>	The RESPONDENT reaffirms its intention to revoke its purchase offer.
<b>21 June 2006</b>	The RESPONDENT receives the CLAIMANT’S acceptance.
<b>15 July 2006</b>	The CLAIMANT submits to the RESPONDENT a report by Prof. Ericson, dismissing the newspaper allegations as wrong.
<b>10 August 2006</b>	The RESPONDENT insists that the matter is closed.
<b>18 June 2007</b>	The CLAIMANT submits a Request for Arbitration to JAMS.
<b>04 July 2007</b>	The RESPONDENT commences an action in the Commercial Court of Vindobona, claiming the arbitration agreement invalid.
<b>17 August 2007</b>	The Arbitral Tribunal is fully composed.



## STATEMENT OF PURPOSE

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

- The Arbitral Proceedings should continue (**FIRST ISSUE**).
- The Arbitral Tribunal has jurisdiction on the grounds of an effective arbitration agreement (**SECOND ISSUE**).
- The RESPONDENT'S breach of the arbitration agreement entails procedural and financial consequences (**THIRD ISSUE**).
- A contract of sale was concluded (**FOURTH ISSUE**).
- Blue Hills 2005 was fit for the particular purpose made known to the CLAIMANT (**FIFTH ISSUE**).



## ARGUMENT TO THE PROCEDURAL ISSUES

### FIRST ISSUE: THE ARBITRAL PROCEEDINGS SHOULD CONTINUE

- 1 The Arbitral Tribunal is respectfully requested to continue the Arbitral Proceedings.
- 2 After receiving the notice of Arbitration, the RESPONDENT commenced an action before the Commercial Court of Vindobona, Danubia (hereinafter “the Commercial Court”). It petitioned the court to rule on the existence of an arbitration agreement [*Procedural Order No. 2, para. 9, p. 52*]. At the same time, the RESPONDENT requested the Tribunal to stay its proceedings and to await the decision of the court pursuant to Art. 8(3) Danubian Arbitration Law (hereinafter “DAL”) [*Statement of Defense, paras. 13, 21, pp. 38, 40*]. However, this argument must fail.
- 3 The DAL governs the current Arbitral Proceedings. The law governing the arbitration agreement is the law of the place of arbitration [*WHITWORTH STREET ESTATES V. JAMES MILLER & PARTNERS, HOUSE OF LORDS; TUNISIENNE V. ARMAMENT MARITIME, HOUSE OF LORDS; HAMBURG FRIENDLY ARBITRATION, 29 Dec 1998, REDFERN/HUNTER, paras. 2-05 et seq.; HIRSCH, p. 43; PARK, p. 23*]. Since the parties to the dispute stipulated Arbitration to take place in Vindobona, Danubia, the DAL is to be applied. Art. 8(3) DAL stipulates that “arbitral proceedings may [...] be commenced or continued [...] while the issue is pending before the court.” Accordingly, the Tribunal has discretion to commence and continue Arbitral Proceedings [*Procedural Order No. 1, para. 7, pp. 48, 49*].
- 4 Irrespective of the conclusion of an arbitration agreement, the Arbitral Tribunal is kindly requested to continue Arbitration. First, numerous reasons militate for the continuation of the Arbitral Proceedings (**A**). Second, there are no reasons for staying the Arbitral Proceedings (**B**).

#### A. NUMEROUS REASONS MILITATE FOR THE CONTINUATION OF ARBITRATION

- 5 First, the purpose of Art. 8(3) DAL necessitates the continuation of the Arbitral Proceedings (**I**). Second, the dispute will be resolved faster by means of arbitration (**II**). Third, dispute settlement by means of arbitration was the parties’ original intent (**III**). Finally, the RESPONDENT should not gain advantage from the assumed breach of the arbitration agreement (**IV**).



## **I. THE PURPOSE OF ART. 8(3) DAL NECESSITATES CONTINUATION OF THE ARBITRAL PROCEEDINGS**

- 6 The purpose of Art. 8(3) DAL necessitates the continuation of the present Arbitral Proceedings irrespective of whether the case is pending before a court.
- 7 In order to interpret Art. 8(3) DAL, the materials and legislative history of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “UNCITRAL Model Law ICA”) are to be consulted since Danubia has adopted the UNCITRAL Model Law ICA [*Statement of Claim, para. 18, p. 6; Statement of Defense, para. 4, p. 36*]. Additionally, § 1032(3) of the German Code of Civil Procedure (hereinafter “ZPO”) should be taken into account since it corresponds *verbatim* to Art. 8(3) DAL [*Procedural Order No. 2, para. 2, p. 51*].
- 8 Art. 8(3) DAL was enacted to avoid any delays in arbitral proceedings. It aims at contributing to fast and cost-saving procedures and to dispute resolution without delay [*HOLTZMANN/NEUHAUS, p. 306; Stein/Jonas/SCHLOSSER, § 1032 para. 22; CALAVROS, p. 53; SAENGER, § 1032 para. 18; REICHOLD, § 1032 para. 6; Zöller/GEIMER, § 1032 para. 25; HUßLEIN-STICH, p. 50*]. Accordingly, raising an action before a court with the sole purpose of obstructing the arbitral proceedings must not be permitted [*FOUCHARD/GAILLARD/GOLDMAN, para. 680*]. Otherwise, parties challenging the validity of the arbitration agreement might deliberately interfere with the ongoing arbitration. Precipitous stay of arbitral proceedings should therefore not be granted [*Stein/Jonas/SCHLOSSER, § 1032 para. 22; SCHROETER, Antrag, p. 291*].
- 9 Summarising, an interpretation of Art. 8(3) DAL resolves that state court litigation in the Commercial Court must not affect the Arbitral Proceedings. Thus, the Arbitration should be continued.

## **II. THE DISPUTE WILL BE RESOLVED FASTER BY ARBITRATION**

- 10 The Arbitral Proceedings should be continued because the dispute at hand would be resolved faster.
- 11 Pursuant to the principle of competence-competence, the Tribunal has the power to decide on its own jurisdiction. This is set out in Art. 16(1) DAL and generally accepted in international arbitration [*ICC AWARD NO. 4472 (1984); ICC AWARD NO. 4367 (1984); ICC AWARD NO. 4402 (1983); FOUCHARD/GAILLARD/GOLDMAN, para. 650; HOLTZMANN/*



*NEUHAUS, p. 478*]. An award by the Tribunal may be issued as soon as the oral hearings are completed in March 2008 [*Procedural Order No. 1, para. 13, p. 50*]. On the other hand, a decision by the Commercial Court is not expected before summer 2008 [*Procedural Order No. 2, para. 10, p. 53*]. That decision would furthermore merely pertain to the existence or non-existence of an arbitration agreement while the Tribunal's award would decide the entire dispute. Therefore, continuing the Arbitral Proceedings would considerably save time.

### III. DISPUTE SETTLEMENT BY MEANS OF ARBITRATION WAS THE PARTIES' ORIGINAL INTENT

- 12 Arbitration should proceed as both the CLAIMANT and the RESPONDENT demonstrated their intention to settle disputes by arbitration.
- 13 First, irrespective of whether the parties eventually concluded an arbitration agreement, they demonstrated their general will in favour of arbitration. As the RESPONDENT included an offer to arbitrate in its purchase offer [*Claimant's Exhibit No. 5, para. 13, p. 13*] which the CLAIMANT accepted [*Claimant's Exhibits Nos. 5, 8, pp. 13, 16*], both parties had initially designated arbitration to settle arising disputes.
- 14 Second, that point is confirmed in particular by the wording of the arbitration clause in the contract. It provides that "any dispute [...] including the formation [of the contract...] will be referred to and finally determined by arbitration" [*Claimant's Exhibit No. 5, para. 13, p. 13*]. At hand, the parties argue about the formation of the contract. Consequently, it is reasonable and in line with the parties' intentions to continue the Arbitration in order to settle this dispute.
- 15 Third, as it was the RESPONDENT who introduced arbitration into the contractual relation with the CLAIMANT, the will to arbitrate must be attributed to the RESPONDENT. The commencement of litigation by the RESPONDENT in this particular case however contradicts that express will to arbitrate. Hence, it violates the prohibition of contradictory behaviour (*venire contra factum proprium*). Since the RESPONDENT should not benefit from its contradictory conduct, the Arbitral Tribunal and not the Commercial Court should decide whether an arbitration agreement was concluded.
- 16 Summarising, Arbitration should proceed as both the CLAIMANT and the RESPONDENT demonstrated their intention to settle disputes by arbitration.



#### **IV. THE RESPONDENT SHOULD NOT GAIN ADVANTAGE FROM THE ASSUMED BREACH OF THE ARBITRATION AGREEMENT**

- 17 The RESPONDENT should not gain advantage from a violation of the arbitration agreement. Under Art. 17(3) JAMS International Arbitration Rules (hereinafter “JAMS IAR”), commencement of litigation constitutes a breach of the arbitration agreement. In case the Arbitral Proceedings were stayed, the RESPONDENT would have successfully hindered the Tribunal from finding the validity of the arbitration agreement. The breach itself would hinder the breach from being detected. The RESPONDENT must not gain advantage from such conduct. Thus, Arbitral Proceedings should be continued.
- 18 In conclusion, Arbitration should proceed as the very purpose of Art. 8(3) DAL necessitates the continuation of the Arbitral Proceedings, as dispute resolution by arbitration is faster than state litigation and as it corresponds with the parties’ original intent. Moreover, the RESPONDENT should not gain advantage from its assumed breach of the arbitration agreement.

#### **B. THERE ARE NO REASONS FOR STAYING THE ARBITRAL PROCEEDINGS**

- 19 No reasons obstruct the continuation of the Arbitral Proceedings. The RESPONDENT argues that the Arbitral Proceedings have not yet begun and that two proceedings would duplicate costs [*Statement of Defense, para. 13, p. 38*]. However, the RESPONDENT may not reasonably invoke these objections. First, the Arbitral Proceedings have indeed already commenced **(I)**. Second, it was the RESPONDENT who caused additional costs by commencing an action in the Commercial Court **(II)**. Third, in order to save costs it is not the arbitration but the state court litigation that should be stayed **(III)**.

#### **I. THE ARBITRAL PROCEEDINGS HAVE ALREADY COMMENCED**

- 20 Contrary to the RESPONDENT’S allegation [*Statement of Defense, para. 13, p. 38*], the Arbitral Proceedings have presently already commenced.
- 21 Art. 2(5) JAMS IAR stipulates that “the arbitration will be deemed to have commenced on the date on which JAMS receives the Request for Arbitration”. The CLAIMANT filed its Request for Arbitration on 18 June 2007 [*Request for Arbitration, p. 3*] with JAMS acknowledging its receipt on 21 June 2007 [*Letter JAMS to Fasttrack,*



p. 26]. Therefore, Arbitration has commenced on 21 June 2007 by virtue of Art. 2(5) JAMS IAR.

22 In addition, the Arbitral Tribunal has already been composed. This is the case when all arbitrators have accepted their appointment [*BAYOBLG*, 9 Sep 1999; *Stein/Jonas/SCHLOSSER*, § 1032 para. 21; *BERGER*, p. 18; *LACHMANN*, para. 457; *SESSLER*, p. 9; *HUBER*, p. 74]. Prof. Dr. Presiding Arbitrator accepted the appointment as President of the Tribunal on 17 August 2007 [*Letter Prof. Dr. Presiding Arbitrator to JAMS*, p. 47]. Therefore, the Tribunal is composed.

23 Furthermore, the substantive issues have already been duly prepared for the arbitration to begin. Both Counsel for the CLAIMANT and Counsel for the RESPONDENT have already filed statements on the merits [*Statement of Claim*, p. 4; *Amendment to Statement of Claim*, p. 31; *Statement of Defense*, p. 36]. In this context, the arbitral proceedings must be regarded as having commenced.

24 In any case, the Arbitral Proceedings do not even need to have commenced at all. Art. 8(3) DAL expressly stipulates that “arbitral proceedings may [...] be commenced or continued [...] while the issue is pending before the court”. It therefore expressly permits the initiation of proceedings irrespective of already pending litigation.

25 To conclude, the Arbitral Proceedings have commenced according to Art. 2(5) JAMS IAR, the Tribunal is composed and all requirements for Arbitration are met.

## II. IT WAS THE RESPONDENT WHO CAUSED ADDITIONAL COSTS

26 The RESPONDENT may not argue that continuing Arbitral Proceedings would cause unjustified additional costs. By commencing litigation in the Commercial Court, the RESPONDENT bears the exclusive responsibility for the duplication of proceedings.

27 The duplication of proceedings solely derives from the commencement of the state court litigation. Up to 4 July 2007, only Arbitral Proceedings were pending. When the RESPONDENT filed its request to the Commercial Court [*Procedural Order No. 2*, para. 9, p. 52], it was aware that Arbitral Proceedings had already been initiated. The RESPONDENT moreover must have been aware that it caused additional costs. Therefore, it is not the continuation of the Arbitral Proceedings causing additional costs but the commencement of action before the Commercial Court. Since the RESPONDENT could





have foreseen these additional costs and therefore must have accepted them, the Arbitral Proceedings should not be affected. Hence, as it is the RESPONDENT that started state court litigation, the additional costs arising thereof cannot justify a stay of Arbitration.

**III. IN ORDER TO AVOID DUPLICATE PROCEEDINGS IT IS THE STATE COURT LITIGATION THAT SHOULD BE STAYED**

- 28 If duplicate costs are to be avoided, the Commercial Court is the one to stay its proceedings.
- 29 The Swiss Supreme Court held that in the interest of efficiency, when a dispute is pending before an arbitral tribunal and before a national court, the authority first seized decides on the validity of the arbitration agreement. The other authority must stay its proceedings until the issue is ruled upon [*BG, 14 May 2001, “Fomento case”, the applicable arbitration law was the Swiss Private International Law Statute*].
- 30 At hand, Arbitration was initiated by the CLAIMANT on 18 June 2007 [*Request for Arbitration, p. 3*], whereas litigation in the Commercial Court did not start until 4 July 2007 [*Procedural Order No. 2, para. 9, p. 52*]. The Arbitral Tribunal was the authority seized first. Applying the reasoning of the “Fomento case” to the present dispute, the Tribunal should decide on the validity of the arbitration agreement while the Commercial Court must stay its proceedings.
- 31 **RESULT OF THE FIRST ISSUE:** The Arbitral Tribunal is requested not to grant a stay but to continue its proceedings. First, the purpose of Art. 8(3) DAL necessitates continuation of the Arbitral Proceedings. Second, the dispute at hand will be resolved faster by arbitration. Third, dispute settlement by means of arbitration was the parties’ original intent. Finally, the RESPONDENT should not benefit from the assumed breach of the arbitration agreement. Furthermore, the duplication of costs does not hinder the continuation of Arbitral Proceedings.



**SECOND ISSUE: THE ARBITRAL TRIBUNAL HAS JURISDICTION ON THE GROUNDS OF AN EFFECTIVE ARBITRATION AGREEMENT**

- 32 Since the parties effectively concluded an arbitration agreement, the Arbitral Tribunal has jurisdiction.
- 33 The RESPONDENT included an offer to arbitrate arising disputes in its purchase order of 10 June 2006 [*Claimant's Exhibit No. 5, para. 13, p. 13*]. When the CLAIMANT accepted that offer on 19 June 2006, the arbitration agreement became effective. The RESPONDENT in contrast alleges to have revoked both the purchase offer and the offer to arbitrate by notice of 18 June 2006 [*Statement of Defense, para. 7, p. 37*]. However, irrespective of whether the sales contract was ever concluded, the arbitration agreement came into existence independently. The offer to arbitrate was not revoked as it was independent from the purchase offer and therefore required a separate revocation **(A)** which was never communicated **(B)**.

**A. THE OFFER TO ARBITRATE IS INDEPENDENT FROM THE PURCHASE OFFER**

- 34 As the RESPONDENT'S offer to arbitrate was autonomous, its effectiveness does not depend on the validity of the purchase offer.
- 35 Art. 17(1)(2) JAMS IAR provides that "an arbitration clause shall be treated as an agreement independent of the other terms of the contract". The provision implements the doctrine of separability, a generally recognised principle of international commercial arbitration [*PRIMA PAINT V. FLOOD & CONKLIN, U. S. CT. APP. (2ND CIR.); COUR DE CASSATION, 7 May 1963, "GOSSET C/ CARAPPELLI"; LESOTHO HIGHLANDS V. IMPREGGIO, HOUSE OF LORDS; CÁMARA NACIONAL DE APELACIONES EN LO COMMERCIAL, 26 Sep 1988; ICC AWARD No. 1507 (1970); ICC AWARD No. 4381 (1986); REDFERN/HUNTER, para. 5-36; VARADY/BARCELO/vMEHREN, p. 125; LEW/MISTELIS/KRÖLL, p. 75*]. In essence, it clarifies that the parties to arbitration conclude not one but two agreements. The "arbitral twin survives any birth defect or acquired disability of the principle agreement" [*SCHWEBEL, p. 5*].
- 36 The case *SOJUZNEFTEEXPORT V. JOC OIL* illustrates that not only two contracts are concluded but also two declarations are made. Since the parties failed to meet signature requirements under the applicable Russian law when concluding the main contract, the Bermuda Court of Appeal found the main contract to be invalid [*SOJUZNEFTEEXPORT V.*



*JOC OIL, BERMUDA CT. APP.*]. According to the doctrine of separability, the offer to conclude the main contract was to be distinguished from the offer to arbitrate. Therefore, the formal requirements that affected the conclusion of the main contract did not extend to the offer to arbitrate. As it was sufficient to accept the offer to arbitrate with a single signature, an arbitration agreement was effectively concluded.

- 37 Applying the well established doctrine of separability as well as the decision of the Bermuda Court of Appeals to the present case, the RESPONDENT'S offer to arbitrate was separate from the purchase offer. Therefore, this separate offer to arbitrate required an independent revocation.

#### **B. THE RESPONDENT DID NOT REVOKE THE OFFER TO ARBITRATE**

- 38 Contrary to the RESPONDENT'S allegation, the RESPONDENT did not revoke its offer to arbitrate. Its e-mail of 18 June 2006 [*Claimant's Exhibit No. 9, p. 17*] was solely related to the purchase offer and therefore did not affect the offer to arbitrate.

- 39 A revocation of an offer is generally permitted according to Art. 16(1) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG"). The CISG is applicable since the law that governs the sales contract also governs the arbitration agreement [*FILANTO V. CHILEWICH, U. S. DIST. CT. (S. D. N. Y.); TRIBUNAL SUPREMO, 17 Feb 1998; OLG FRANKFURT, 26 June 2006; MAGNUS, p. 111; SCHROETER, p. 121*]. Still, any revocation requires to be communicated.

- 40 An interpretation of the e-mail of 18 June 2006 clarifies that the RESPONDENT did not revoke its offer to arbitrate. First, the RESPONDENT'S e-mail expressly states that it is "withdrawing the offer to purchase 20,000 cases of Blue Hills 2005" [*Claimant's Exhibit No. 9, p. 17*]. Not a single word relates to the offer to arbitrate or to arbitration as such. The e-mail only reflects the RESPONDENT'S discontent with the alleged non-conformity of the wine. By contrast, it does not even make implied reference to discontent with arbitration. Therefore, the RESPONDENT'S e-mail did not contain a revocation of its offer to arbitrate.

- 41 Moreover, the arbitration clause expressly referred to disputes arising out of the formation of contracts [*Claimant's Exhibit No. 5, para. 13, p. 13*]. Thus, the RESPONDENT demonstrated its awareness of potential disputes arising from the offer and its intent to settle these disputes by means of arbitration. Had the RESPONDENT no longer intended



arbitration to resolve potential disputes relating to the formation of the contract, it must reasonably be expected to have expressly said so.

42 Furthermore, the RESPONDENT'S subsequent conduct shows that it did not mean to revoke its offer to arbitrate. In its letters following the alleged revocation the RESPONDENT solely referred to the purchase of wine [*Claimant's Exhibits Nos. 11, 14, 16, pp. 19, 23, 25*]. It showed its intention to make the purchase of the wine undone. It did not show in any way, neither expressly nor impliedly, that it wanted to address the offer to arbitrate. As the RESPONDENT strictly focussed on the purchase of the wine, neglecting the offer to arbitrate, it was reasonable to assume that the offer to arbitrate was meant to remain effective.

43 Even at a stage the disagreement between the CLAIMANT and the RESPONDENT grew more urgent, the RESPONDENT refrained from mentioning the offer to arbitrate. When the CLAIMANT and the RESPONDENT consulted their lawyers [*Claimant's Exhibits Nos. 10, 11, pp. 18, 19*] it became clear that the dispute was most likely not to be resolved by a mere "I am sorry" [*Claimant's Exhibit No. 16, p. 25*] but that it required either litigation or arbitration. Still, the RESPONDENT did not mention its offer to arbitrate. It was therefore reasonable to assume that the RESPONDENT still intended to submit the arisen dispute to arbitration.

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

45 **RESULT OF THE SECOND ISSUE:** The offer to arbitrate is an autonomous offer which does not depend on the offer to conclude a sales contract. In order to revoke it, a separate revocation is essential. At hand, the RESPONDENT did not declare the revocation of its offer to arbitrate. The offer was still effective when the CLAIMANT dispatched its acceptance on 19 June 2006, whereby the parties agreed on arbitration.

46 In any case the offer to arbitrate was not revoked since it was irrevocable pursuant to Art. 16(2) CISG and the revocation was not communicated in due time as will be demonstrated in the Fourth Issue.



**THIRD ISSUE: THE RESPONDENT’S BREACH OF THE ARBITRATION AGREEMENT ENTAILS PROCEDURAL AND FINANCIAL CONSEQUENCES**

47 By commencing litigation in the Commercial Court, the RESPONDENT breached the arbitration agreement. Pursuant to Art. 17(3) JAMS IAR, “the parties will be treated as having agreed not to apply to any court or other judicial authority.” The RESPONDENT nevertheless commenced litigation in the Commercial Court [*Procedural Order No. 2, para. 9, p. 52*] and therefore breached the arbitration agreement **(A)**. As a consequence, the Tribunal is requested to order the RESPONDENT to terminate litigation, to pay the full litigation costs and to infer the arbitration agreement to be concluded **(B)**.

**A. THE RESPONDENT BREACHED THE ARBITRATION AGREEMENT**

48 The RESPONDENT’S commencement of action before the Commercial Court violates Art. 17(3) JAMS IAR. The RESPONDENT might nonetheless argue that it was permitted to commence litigation according to Art. 8(2) DAL. The provision states that “prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible” [*Statement of Defense, para. 11, p. 38*]. However, Art. 8(2) DAL is not mandatory law and can be superseded by Art. 17(3) JAMS IAR. In the present dispute it is inapplicable since the parties agreed on the JAMS IAR.

49 Arbitration solely depends on party autonomy [*ECJ, 23 Mar 1982; FOUCHARD/GAILLARD/GOLDMAN, para. 45*]. Mandatory law on the other hand invalidates the parties’ choices. Therefore, mandatory rules must be easily recognisable as such. However, Art. 8(2) DAL is not recognisable as a mandatory provision for the following reasons.

50 First, the provision’s legislative history does not imply a mandatory character. Danubia adopted the UNCITRAL Model Law ICA as its arbitration law. There is no rule similar to Art. 8(2) DAL in the UNCITRAL Model Law ICA. The UNCITRAL Commission was aware of the necessity of mandatory provisions as such [*UN DOC. A/CN.9/207, para. 19*]. Since a rule similar to Art. 8(2) DAL was not even incorporated as a default provision, it is reasonable to assume that it is not mandatory when added by a national legislator.

51 Second, Art. 8(2) DAL states that “prior to the constitution of the arbitral tribunal” an application to a national court can be made. The provision is only applicable until the



arbitral tribunal is composed. It is, however, unreasonable to regard Art. 8(2) DAL mandatory up to the composition of the tribunal when it is not applicable at all after that point of time has passed. Thus, Art. 8(2) DAL is not a mandatory provision.

- 52 By agreeing on Art. 17(3) JAMS IAR, the parties waived Art. 8(2) DAL. Nonetheless, the RESPONDENT initiated an action in the Commercial Court on 4 July 2007 [*Procedural Order No. 2, para. 9, p. 52*] and thereby breached its obligations under Art. 17(3) JAMS IAR. The RESPONDENT therefore violated the arbitration agreement.

**B. THE TRIBUNAL IS REQUESTED TO IMPOSE PROCEDURAL AND FINANCIAL CONSEQUENCES ON THE RESPONDENT**

- 53 Subsequent to the RESPONDENT'S breach of the arbitration agreement, the consequences are to be derived from Art. 27(3) JAMS IAR. Accordingly, "the Tribunal may draw the inferences that it considers appropriate" if a party fails to comply with any provision of these Rules. First, the Tribunal is requested to order the RESPONDENT to terminate litigation in the Commercial Court **(I)**. Second, the RESPONDENT shall be ordered to pay the full costs of litigation **(II)**. Third, the Tribunal should draw the inference that the CLAIMANT and the RESPONDENT concluded an arbitration agreement **(III)**.

**I. THE RESPONDENT SHOULD BE ORDERED TO TERMINATE LITIGATION**

- 54 The Tribunal is kindly requested to order the RESPONDENT to terminate litigation in the Commercial Court.

- 55 A party must not bypass the mutually agreed method of settling disputes [*MCCREARY V. CEAT, U. S. CT. APP. (3RD CIR.)*; *COOPER V. ATELIERS DE LA MOTOBECANE, CT. APP. N. Y.*; *AGGELIKI V. PAGNAN, U.K. CT. APP.*; *ICSID CASE NO. ARB/03/29*; *BORN, p. 946*]. Litigation in the Commercial Court is presently violating the arbitration agreement and therefore bypasses the mutually agreed method of settling disputes. It is of highest priority to bring this ongoing violation to an end by an immediate stop of litigation.

- 56 Moreover, terminating litigation in the Commercial Court would not deprive the RESPONDENT of protection. Instead, the JAMS IAR provide for an adequate remedy which the RESPONDENT has so far neglected. According to Art. 17(2)(1) JAMS IAR, a



party may object jurisdiction of the Tribunal. Therefore, the matter must be resolved within the framework of arbitration since this is what the parties agreed upon. Should the RESPONDENT wish to object to the jurisdiction of the Arbitral Tribunal, it may invoke Art. 17(2)(1) JAMS IAR.

57 In any case, the Arbitral Tribunal is requested to order the RESPONDENT to terminate litigation in the Commercial Court in accordance with Art. 27(3) JAMS IAR.

## **II. THE RESPONDENT SHALL BE ORDERED TO PAY THE FULL COSTS OF LITIGATION**

58 The Tribunal should order the RESPONDENT to compensate the CLAIMANT for the full costs of litigation before the Commercial Court. The disadvantages the CLAIMANT suffers due to the RESPONDENT'S violation of the arbitration agreement are to be determined. The RESPONDENT'S breach of the arbitration agreement cannot put the CLAIMANT in a worse position than it would have been in, had the RESPONDENT complied with the agreement.

59 As a result of the RESPONDENT'S breach of the arbitration agreement, the CLAIMANT suffers additional expenses for representation before the Court as well as Court costs. These expenses would not have arisen if the RESPONDENT had abided by the arbitration agreement.

60 In summary, the RESPONDENT shall be ordered to pay the full costs it caused by addressing the Commercial Court.

## **III. THE TRIBUNAL SHOULD DRAW THE INFERENCE THAT THE CLAIMANT AND THE RESPONDENT CONCLUDED AN ARBITRATION AGREEMENT**

61 The Arbitral Tribunal should draw the inference that the parties did conclude an arbitration agreement.

62 It is widely agreed that the Arbitral Tribunal may draw adverse inferences from a party's misconduct [*DERAINS*, p. 1058; *FOUCHARD/GAILLARD/GOLDMAN*, para. 1275; *BORN*, p. 971]. In ICC AWARD NO. 8694 (1996), the respondent failed to provide a document required as evidence. The tribunal consequently inferred "without hesitation" the adverse content of that document proven.

63 The case in dispute is comparable to ICC AWARD NO. 8694, since in both cases one party violated the arbitration agreement: In the ICC case, the respondent deliberately



refused to comply with an order of the tribunal. At hand, the RESPONDENT violated the arbitration agreement by commencing litigation. Furthermore, in both cases, the violating action aimed at preventing the arbitral tribunal from deciding on the dispute. In the ICC case, the respondent intended to keep the content of its document secret so that no decision could be made on its grounds. At hand, the RESPONDENT petitions the Commercial Court to declare the arbitration agreement ineffective and thereby prevents the Arbitral Tribunal from deciding on the case [*Statement of Defense, para. 8, p. 37*].

64 Applied to the case at hand, the existence of an arbitration agreement is the key the RESPONDENT tries to withhold from the Tribunal in order to deprive it of its jurisdiction on the matter. The Tribunal may therefore draw the inference, that the CLAIMANT and the RESPONDENT have concluded an arbitration agreement.

65 **RESULT OF THE THIRD ISSUE:** By concluding the arbitration agreement, the parties agreed on Art. 17(3) JAMS IAR. Thereby they agreed to abstain from calling upon any judicial authority other than the Arbitral Tribunal. By commencing litigation before the Commercial Court, the RESPONDENT violated the arbitration agreement. Regarding the consequences of that breach, the Arbitral Tribunal may draw the inferences it considers appropriate pursuant to Art. 27(3) JAMS IAR. It is requested to order the RESPONDENT to terminate litigation and to pay the full costs of litigation. Moreover, the Tribunal should draw the inference, that the CLAIMANT and the RESPONDENT concluded an arbitration agreement.





## ARGUMENT TO THE SUBSTANTIVE ISSUES

### FOURTH ISSUE: A CONTRACT OF SALE WAS CONCLUDED

66 The CLAIMANT and the RESPONDENT effectively concluded a contract of sale under the CISG.

67 The CISG governs the sales contract pursuant to Art. 18(1)(2) JAMS IAR. This provision states that the Arbitral Tribunal is to “apply the law [...] which it determines to be most appropriate.” Pursuant to Art. 1(1)(a) CISG, the Convention governs international sale contracts where the States are Contracting States. The dispute at hand arose out of a sales contract. Additionally, both Mediterraneo and Equatoriana have adopted the CISG [*Statement of Claim, para. 15, p. 6; Statement of Defense, para. 2, p. 36*]. Thus, the CISG is the law most appropriate according to Art. 18(1)(2) JAMS IAR.

68 A contract of sale was concluded in accordance with Art. 23 CISG as the RESPONDENT made an offer (A) which it did not revoke (B). The CLAIMANT accepted that offer (C).

#### A. THE RESPONDENT MADE AN EFFECTIVE OFFER

69 On 10 June 2006 the RESPONDENT offered to purchase 20,000 cases of Blue Hills 2005. This offer became effective when it reached the CLAIMANT on 11 June 2006.

70 According to Art. 14(1) CISG, an offer is made when a party proposes to conclude a contract in a sufficiently definite manner. By proposing to purchase 20,000 cases of Blue Hills 2005 at a price of US\$68.00 per case [*Claimant’s Exhibit No. 5, p. 13*] the RESPONDENT made a sufficiently definite proposal constituting an offer pursuant to Art. 14(1) CISG.

71 This offer became effective on 11 June 2006 by reaching the CLAIMANT. According to Art. 24 CISG an offer reaches the addressee when it is delivered to his place of business. Handing the declaration to an authorised person suffices to meet the requirements of Art. 24 CISG [*HONNOLD, para. 179; Schlechtriem/Schwenzer/SCHLECHTRIEM (eng.), Art. 24 para. 12; Bianca/Bonell/FARNSWORTH, Art. 24 para. 2.4; ACHILLES, Art. 24 para. 3; WEY, para. 795*]. In the present case the CLAIMANT’S authorised representative Ms Kringle received the offer on 11 June 2006 [*Claimant’s Exhibit No. 6, p. 14*]. Hence, the RESPONDENT’S offer became effective on that day.

**B. THE RESPONDENT'S OFFER WAS NOT EFFECTIVELY REVOKED**

72 The RESPONDENT alleges to have revoked its offer pursuant to Art. 16(1) CISG [*Statement of Defense, para. 6, p. 37*]. However, the RESPONDENT'S offer was irrevocable pursuant to Art. 16(2) CISG **(I)**. Even if the offer was to be considered revocable no effective revocation was communicated in time **(II)**.

**I. THE RESPONDENT'S OFFER WAS IRREVOCABLE ACCORDING TO ART. 16(2) CISG**

73 The RESPONDENT'S offer indicated irrevocability according to Art. 16(2)(a) CISG **(1)**. Moreover, the CLAIMANT reasonably relied on the irrevocability of the offer, thereby causing irrevocability according to Art. 16(2)(b) CISG **(2)**.

**1. THE RESPONDENT'S OFFER WAS IRREVOCABLE ACCORDING TO ART. 16(2)(a) CISG**

74 By stating a fixed time for acceptance and expressing its intention to be bound, the RESPONDENT rendered the offer irrevocable until 21 June 2006.

75 Pursuant to Art. 16(2)(a) CISG "an offer cannot be revoked if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable". The mere wording of the provision implies that stating a fixed time for acceptance alone is sufficient to render the offer irrevocable [*MüKoBGB/GRUBER, Art. 16 para. 12*]. Accordingly, setting a time for expiry of the offer excludes a revocation from coming into effect.

76 Moreover, the legislative history of Art. 16 CISG reflects the provision's attempt to balance different legal approaches [*SCHWENZER/MOHS, p. 242; Bianca/Bonell/EÖRSI, Art. 16 paras. 1.6, 1.7.2 and 2.1.1; HERBER/CZERWENKA, Art. 16 para. 1; DILGER, p. 186*]. Art. 16(1) CISG generally grants the possibility to revoke an offer in accordance with common law principles. Art. 16(2)(a) CISG in contrast corresponds to the civil law approach [*HONNOLD, para. 142; SONO, p. 478; ZWEIGERT/KÖTZ, p. 37*]. According to civil law principles, fixing a time for expiry is regarded an irrebuttable presumption expressing the intention to be bound for the indicated period [*MALIK, Section III*]. Consequently, a fixed time for acceptance always renders the offer irrevocable.

77 In any case, stating a fixed time for acceptance justifies the presumption of an intention to be bound for that period [*Schlechtriem/Schwenzer/SCHLECHTRIEM (eng.), Art. 16 para. 9; SONO, p. 479*]. Thus, "an offeror wishing to fix a time for lapse but not



for irrevocability should make his intention plain” [FARNSWORTH, § 3.04 sub. 3-12(2)]. By insisting on having concluded the contract not later than 21 June 2006 [*Claimant’s Exhibit No. 4, p. 12*] the RESPONDENT fixed a time for acceptance and therefore indicated the irrevocability of the offer.

78 In addition, the RESPONDENT did not rebut this presumption but expressed that the offer was meant to be irrevocable. Pursuant to Art. 8(3) CISG all relevant circumstances including subsequent conduct are to be taken into consideration in order to determine the intent of a party.

79 First, the RESPONDENT repeatedly underlined its intense time pressure to prepare the wine promotion [*Claimant’s Exhibits Nos. 4, 7, pp. 12, 15*] and certified Blue Hills 2005 had “just the right character to take the lead in the promotion” [*Claimant’s Exhibit No. 2, p. 10*]. Moreover, the RESPONDENT never even considered purchasing a substitute wine. It thereby created the impression of depending on the purchase.

80 Second, the RESPONDENT altered the purchase conditions to its benefit. The CLAIMANT proposed to grant a 10 percent discount for a purchase of 10,000 cases of Blue Hills 2005 and a 15 percent discount for a purchase of 20,000 cases [*Claimant’s Exhibit No. 3, p. 11*]. The RESPONDENT bindingly ordered 15,000 cases but submitted the remaining 5,000 cases to a condition. However, it premised the discount granted for a definite purchase of 20,000 cases [*Claimant’s Exhibit No. 5, p. 13*] and thereby put forward changes to the offered price. Thus, it was reasonable for the CLAIMANT to assume that the RESPONDENT intended to stay with these favourable conditions.

81 Third, the RESPONDENT insisted on Mr Cox acting on the offer immediately after returning to office albeit knowing that this would not be the case before 19 June 2006 [*Claimant’s Exhibits Nos. 6, 7, pp. 14, 15*]. It thereby accepted that the offer was not to be dealt with before that day. In doing so, the RESPONDENT underlined that it considered the offer irrevocable at least until 19 June 2006 when the CLAIMANT would have the opportunity to act.

82 To conclude, the RESPONDENT rendered the offer irrevocable pursuant to Art. 16(2)(a) CISG by stating a fixed time for acceptance and expressing its intention to be bound.



## 2. THE RESPONDENT'S OFFER WAS IRREVOCABLE ACCORDING TO ART. 16(2)(b) CISG

83 Even if the Tribunal was not willing to follow the arguments on Art. 16(2)(a) CISG, the offer would still be irrevocable pursuant to Art. 16(2)(b) CISG since the CLAIMANT reasonably relied on its irrevocability and acted in reliance on the RESPONDENT'S offer.

84 According to Art. 16(2)(b) CISG, an offer is irrevocable "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."

85 First, the CLAIMANT relied on the irrevocability of the offer. Reliance was justified since the RESPONDENT created the impression of depending on the purchase of Blue Hills 2005 [*cf. para. 79*].

86 Second, the CLAIMANT acted in reliance on the offer's irrevocability. The offeree does not need to positively act on the offer. For Art. 16(2)(b) CISG to apply, it is sufficient that the offeree refrains from taking any action [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 16 para. 11; Witz/Salger/Lorenz/WITZ, Art. 16 para. 14; Honsell/SCHNYDER/STRAUB, Art. 16 para. 24; Bamberger/Roth/SAENGER, Art. 16 para. 4*]. Likewise, this provision does not require that any damages are caused by the offeree refraining from acting [*GENEVA V. BARR, U. S. DIST. CT. (S. D. N. Y.); Honsell/SCHNYDER/STRAUB, Art. 16 para. 25; HERBER/CZERWENKA, Art. 16 para. 10; MüKoBGB/GRUBER, Art. 16 para. 17*].

87 At hand, Ms Kringle could have informed Mr Cox of the importance to have the contract completed promptly before the end of his business trip. The RESPONDENT'S order was of considerable significance for the CLAIMANT since the amount ordered equals 23 percent of the total production of Blue Hills 2005 [*Procedural Order No. 2, para. 20, p. 54*]. Ms Kringle would have had Mr Cox act on the offer immediately to guarantee the conclusion of the contract. She only refrained from doing so because she reasonably relied on the irrevocability of the offer. Thereby, the CLAIMANT acted in reliance on the offer's irrevocability.

88 Hence, the RESPONDENT'S offer was in any case irrevocable pursuant to Art. 16(2)(b) CISG.



**II. EVEN IF THE OFFER WAS TO BE CONSIDERED REVOCABLE NO EFFECTIVE REVOCATION WAS COMMUNICATED IN TIME**

89 The RESPONDENT did not revoke its offer since neither the letter dated 20 June 2006 (1) nor the e-mail dated 18 June 2006 (2) reached the CLAIMANT in time.

**1. THE RESPONDENT DID NOT REVOKE ITS OFFER THROUGH ITS LETTER OF 20 JUNE 2006**

90 The RESPONDENT'S letter of 20 June 2006 did not cause revocation since it did not reach the CLAIMANT before it dispatched its acceptance.

91 According to Art. 16(1) CISG "an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." At hand, the CLAIMANT dispatched its acceptance in the morning of 19 June 2006 [*Statement of Claim, para. 9, p. 5; Claimant's Exhibit No. 8, p. 16*].

92 Consequently, neither the RESPONDENT'S letter dated 20 June 2006 [*Claimant's Exhibit No. 11, p. 19*] nor later messages could cause revocation of the offer as they did not reach the CLAIMANT before it dispatched its acceptance.

**2. THE ALLEGED REVOCATION CONTAINED IN THE RESPONDENT'S E-MAIL DATED 18 JUNE 2006 DID NOT REACH THE CLAIMANT IN TIME**

93 The RESPONDENT'S purported revocation sent via e-mail on 18 June 2006 did not become effective as it did not reach the CLAIMANT in time pursuant to Art. 16(1) CISG.

94 The CISG is the law applicable to determine the receipt of electronic communication [*SCHWENZER/MOHS, p. 239; Schlechtriem/Schwenzer/SCHLECHTRIEM (eng.), Intro. to Artt. 14-24 para. 5; CISG-AC, Opinion I*]. Although both Equatoriana and Mediterraneo have enacted the text of the UNCITRAL Model Law on Electronic Commerce [*Statement of Claim, para. 16, p. 6*], the CISG has priority over any national law. It applies exclusively when the question in dispute is governed by the CISG [*ENDERLEIN/MASKOW/STROHBACH, Art. 4 para. 3.1; Staudinger/MAGNUS, Art. 4 para. 12; CZERWENKA, p. 166; MüKoHGB/BENICKE, Art. 4 para. 4; MüKoBGB/WESTERMANN, Art. 4 para. 3; SCHROETER, p. 670*]. Art. 24 CISG governs the receipt of messages "delivered by any [...] means" which includes electronic messages [*WORKING GROUP, p. 86; Schlechtriem/*



*Schwenzer/SCHLECHTRIEM, Art. 24 para. 10; Witz/Salger/Lorenz/WITZ, Art. 24 para. 10; Staudinger/MAGNUS, Art. 24 para. 15; ACHILLES, Art. 24 para. 3].* Consequently, the CISG is to be applied.

- 95 Art. 24 CISG provides that a message reaches the addressee when it is “delivered [...] to his place of business or mailing address”. It must have entered the addressee’s own sphere in a manner, that he has facility to notice [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 13; HERBER/CZERWENKA, Art. 24 para. 2; Staudinger/MAGNUS, Art. 24 para. 15; KAROLLUS, pp. 58-59; MüKoHGB/FERRARI, Art. 24 para. 8; Soergel/LÜDERITZ/FENGE, Art. 24 para. 4].* With regard to electronic commerce the addressee’s own sphere is restricted to the addressee’s personal computer [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 12].* The e-mail server itself cannot be controlled in the same way as a personal computer or letterbox [*Schlechtriem/Schwenzer/SCHLECHTRIEM (eng.), Art. 24 para. 3; JANAL, p. 96].* Particularly in the case of server failure, “the message reaches the addressee only after the server is operating again, i.e. when the message can be retrieved” [*Schlechtriem/Schwenzer/SCHLECHTRIEM, Art. 24 para. 3; JANAL, p. 96].*
- 96 Since electronic communication is technically complex it cannot be of relevance whether the server itself or other facilities such as an internal network are temporarily out of order. The dispatcher bears the risk of delay in delivery of electronic messages even if the delay is caused within the addressee’s sphere of risk [*Moritz/Dreier/HOLZBACH/SÜßENBERGER, part C para. 158].* It is justified to impose the risk of loss, damage or delay on the dispatcher since he could have chosen more secure means of communication [*Moritz/Dreier/HOLZBACH/SÜßENBERGER, part C para. 156].*
- 97 It should also be mentioned that the addressee is equally protected under the UNCITRAL Model Law on Electronic Commerce. Under the Model Law a message does not reach the addressee “where the information system of the addressee does not function at all or functions improperly” [*GUIDE TO ENACTMENT, para. 104].* This complies with the purpose of the Model Law not to impose “the burdensome obligation to maintain its [the addressee’s] information system functioning at all times” [*GUIDE TO ENACTMENT, para. 104].*
- 98 Therefore, the RESPONDENT is to bear the risk of delay. In the case at hand, the e-mail entered the CLAIMANT’S server on 18 June 2006. However, it could not be retrieved



before the afternoon of 19 June 2006 [*Statement of Claim, para. 10, p. 5*] and was therefore not received by the CLAIMANT in time to effect revocation of the offer.

99 Moreover, the CLAIMANT fixed its network as quickly as possible. The network collapsed on Sunday, 18 June 2006 [*Statement of Claim, para. 10, p. 5*]. However, one cannot expect the CLAIMANT to start correcting technical problems on a Sunday. Moreover, an adequate time frame to fix the network is to be conceded to the CLAIMANT. Since the CLAIMANT accomplished to correct the network failure by the afternoon of Monday, 19 June 2006 it cannot be held responsible for the temporary technical problem of its information system.

100 The RESPONDENT'S purported revocation thus entered the CLAIMANT'S own sphere not until the afternoon of 19 June 2006. At that time, the CLAIMANT had already dispatched its acceptance [*Statement of Claim, para. 9, p. 5*]. Hence, the RESPONDENT'S purported revocation sent via e-mail on 18 June 2006 did not become effective as it did not reach the CLAIMANT timely pursuant to Art. 16(1) CISG.

### C. THE CLAIMANT ACCEPTED THE RESPONDENT'S OFFER

101 Finally, a contract of sale was concluded according to Art. 23 CISG as the CLAIMANT accepted the offer in time. An acceptance becomes effective at the moment it reaches the offeror, Art. 18(2) CISG. The CLAIMANT'S acceptance dispatched on 19 June 2006 reached the RESPONDENT on 21 June 2006 [*Statement of Claim, para. 9, p. 5*], whereby a contract of sale was concluded according to Art. 23 CISG.

102 **RESULT OF THE FOURTH ISSUE:** The parties validly concluded a contract of sale as the RESPONDENT'S offer was accepted by the CLAIMANT. The RESPONDENT did in particular not revoke its purchase order, as it was irrevocable according to Art. 16(2)(a) CISG and Art. 16(2)(b) CISG. In any case, the purported revocation was not communicated in time.



**FIFTH ISSUE: BLUE HILLS 2005 WAS FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO THE CLAIMANT**

103 Contrary to the RESPONDENT'S allegation [*Statement of Defense, para. 19, p. 39*], Blue Hills 2005 was in conformity with the contract according to Art. 35(2)(b) CISG. The wine was chosen to serve the particular purpose of taking the lead in the RESPONDENT'S wine promotion [*Claimant's Exhibit No. 1, p. 9*]. The RESPONDENT confirmed that Blue Hills 2005 had just the right character to serve that purpose [*Claimant's Exhibit No. 2, p. 10*]. However, when newspaper articles in Equatoriana stated that anti-freeze had been used in the wine from the Blue Hills region of Mediterraneo, the RESPONDENT refused to market the wine [*Claimant's Exhibit No. 9, p. 17*]. It stated that a wine adulterated in that way could not be featured without creating a commercial catastrophe [*Claimant's Exhibit No. 9, p. 17*]. The RESPONDENT therefore claims that Blue Hills 2005 was not in conformity with the contract under Art. 35(2)(b) CISG [*Statement of Defense, para. 19, p. 39*].

104 Nonetheless, Blue Hills 2005 was fit to lead the planned promotion as the newspaper articles did not affect the wine's fitness for the promotion **(A)**. The RESPONDENT furthermore could not reasonably rely on the CLAIMANT'S skill and judgement **(B)**.

**A. THE NEWSPAPER ARTICLES DID NOT AFFECT THE WINE'S FITNESS FOR THE PROMOTION**

105 The wine's fitness for the promotion remained unaffected as the newspaper articles did not put a threat to the commercialisation of Blue Hills 2005 **(I)**. Even considering the articles had affected the commercialisation, the CLAIMANT could not be held accountable **(II)**.

**I. THE NEWSPAPER ARTICLES DID NOT PUT A THREAT TO THE COMMERCIALISATION**

106 Due to the newspapers' accusation, the RESPONDENT suspects that a promotion featuring Blue Hills 2005 would have led to a commercial catastrophe [*Claimant's Exhibit No. 9, p. 17*]. Foremost, the mere suspicion that the wine might not fit the particular purpose made known does not render it unsuitable. Otherwise any buyer could simply claim a good non-conforming by suspecting its unsuitability [*Staudinger/MAGNUS, Art. 35 para. 25*]. If at all, the suspicion must at least be reasonably certain to have any effect.





107 However, the RESPONDENT could not reasonably expect Blue Hills 2005 to fail in leading a profitable promotion on the grounds of the newspaper articles. The success of the promotion was not threatened by the articles as those reported incorrectly (1). Furthermore, the wine's reputation could have been effectively restored (2). The suspicion was moreover unreasonable, as there was no radical drop in sales in other countries (3). In addition, the situation does not bear a resemblance to the Austrian wine scandal in 1985 (4).

#### 1. THE NEWSPAPER ARTICLES REPORTED INCORRECTLY

108 The published newspaper articles are incorrect as no anti-freeze fluids were added to the wine. Blue Hills 2005 is in fact of excellent quality.

109 Prof. Ericson, head of the Wine Research Institute at the Mediterraneo State University and internationally recognised expert in regard to vinification processes [*Statement of Claim, para. 11, p. 5*], clarifies in his expert report on the production of Blue Hills 2005, that no anti-freeze fluids had been added [*Ericson Report, para. 7, p. 22*]. The added substance diethylene glycol was not introduced in order to lower the water's freezing point but to sweeten the wine, which is lawful, harmless and the usual use for it.

110 The concentration of diethylene glycol added to Blue Hills 2005 is lawful, as it is below the limits for consumables imposed by both Mediterraneo and Equatoriana [*Procedural Order No. 2 para. 11, p. 53*]. The observed legal requirements and the expert report of Prof. Ericson ensure and verify that the applied amount of the sweetener is not detrimental to the consumer's health. Diethylene glycol only loses its harmless character, when consumed in excessive amounts [*Ericson Report, para. 9, p. 22; ROBINSON, p. 49*]. The diethylene glycol concentration in the wine measures 0.13 ml per 75-centilitre bottle, while a critical dose amounts to 0.44-0.45 ml per kg body weight [*Ericson Report, para. 8, p. 22*]. Therefore, a 70 kg individual would have to consume a total of 235 bottles of Blue Hills 2005 to even reach an alarming concentration of diethylene glycol. As Prof. Ericson concludes, the alcohol in the wine induces toxic effects prior to those resulting from diethylene glycol [*Ericson Report, para. 9, p. 22*].

111 The RESPONDENT may not argue that additives like diethylene glycol were generally inappropriate for a wine of high quality. Since oenology in general looks back on a long



tradition of enriching techniques which constitute a real improvement and enhancement in value, one cannot reasonably regard the use of additives a negative and unusual aspect [TROOST, p. 570; GALPIN, p. 15; COATES, pp. 20-22; BMELV/DWV, pp. 2-6; JOHNSON, p. 289; RIBÉRAU-GAYON, pp. 313-314; OIV-INTERNATIONAL CODEX, pp. 12, 185; DWI, *List of permitted additives*]. Even the Austrian Wine Law, considered to be the strictest in the world, allows additives in the production of quality wine [Art. 10 Austrian Wine Law; ROBINSON, p. 49; ÖGZ WEINGALERIE, p. 2]. Since the usual use of diethylene glycol as a sweetener is wholly distinct from the use of anti-freeze fluids, it is unreasonable to name it an anti-freezer. Diethylene glycol does not automatically change its nature solely because it might also serve the purpose of lowering water's freezing point when added in excessive amounts.

112 Summarising, diethylene glycol was added as a sweetening agent. This is lawful, harmless and the usual use for it. Therefore, no anti-freeze fluids were added in the production of Blue Hills 2005. The newspaper articles reported incorrectly. Blue Hills 2005 is of excellent quality.

## 2. THE WINE'S REPUTATION COULD HAVE BEEN EFFECTIVELY RESTORED

113 The newspaper articles' accusation did not irrefutably affect the wine's suitability for the promotion since it could have been effectively opposed.

114 Due to the CLAIMANT'S efforts it was clarified that Blue Hills 2005 is of objective high quality and not adulterated in any way [Ericson Report, para. 4, p. 21]. The RESPONDENT may not argue that the articles incontrovertibly evoked fear and rejection in the public since those were false and could have been effectively opposed for example by means of a rival press campaign. The public could have been truthfully informed about the confusing difference between the toxic monoethylene glycol and the chemically wholly distinct diethylene glycol [Ericson Report, para. 6, p. 21]. As Blue Hills 2005 was wrongfully accused, the RESPONDENT could not automatically assume that it was impossible to restore the wine's reputation.

115 A commercial catastrophe was in particular unlikely to occur as there were two and a half months in between the publication of the newspaper articles and the start of the promotion. The articles appeared on 18 June 2006 whereas the promotion was planned to begin in September 2006 [Claimant's Exhibits Nos. 4, 7, pp. 12, 15]. A two and a half



months period suffices to carry out a successful press campaign which effectively disproves the ill-founded concerns.

116 In summary, the articles' accusation did not irrefutably affect the wine's suitability for the promotion since it could have been effectively opposed. As there was a sufficient time period to restore the wine's reputation a 'commercial catastrophe' was not to be expected.

### 3. THERE WAS NO RADICAL DROP IN SALES IN OTHER COUNTRIES

117 Furthermore, it was unreasonable to claim that Blue Hills 2005 would not have led to a profitable promotion as there was no radical drop in sales in any other countries.

118 Although the sales of the wine were somewhat slower than would otherwise have been expected, the decline came nowhere near to a 'commercial catastrophe' [*Procedural Order No. 2, para. 21, p. 54*]. There was in particular no actual threat to the domestic market of Mediterraneo, where the difficulties found their roots. Since the RESPONDENT did not demonstrate that the Equatorianian public would have reacted differently to the articles than the people of other countries, a drastic decline in sales in Equatoriana was not to be expected either.

119 Summarising, the articles' accusation hardly affected the wine's saleability in other countries. Therefore, a radical drop in Equatoriana was beyond reasonable expectations.

### 4. THE SITUATION DOES NOT BEAR A RESEMBLANCE TO THE AUSTRIAN GLYCOL-WINE SCANDAL OF 1985

120 The RESPONDENT might argue that the introduction of diethylene glycol bears the risk of evoking a scandal comparable to the Austrian glycol-wine scandal of 1985. However, the marketing of Blue Hills 2005 would not have caused comparable circumstances because the sweetener diethylene glycol was added in lawful and harmless amounts.

121 The Austrian winegrowers in contrary adulterated their wine by an extremely dangerous concentration of glycol and violated the Austrian Wine Law [*StuttgZ, 9 July 1985; APA, 25 July 1985*]. The diethylene was used to dulcify low-quality wine and arrogate the quality of certified vintages [*NY-TIMES, 24 July 1985*]. The winegrowers therefore obtained high-quality wine certificates through fraud and pretended to sell wine of high quality. That adulteration caused severe health consequences for consumers and



broke the Austrian Wine Law [*OGH, 12 June 1988; BGH, 23 Nov 1988*]. However, the diethylene glycol concentration in Blue Hills 2005 is neither harmful to consumers' health, nor does it break the law of Equatoriana. It is moreover unreasonable to assume that the CLAIMANT tried to create high quality wine since Mediterraneo has no officially recognised designation of "quality wine" [*Procedural Order No. 23, p. 55*]. Therefore, the diethylene glycol concentration would not have evoked circumstances comparable to the situation in Austria in 1985.

- 122 As the facts do not indicate that the Equatorianian public is familiar with the Austrian scandal, the RESPONDENT furthermore may not reasonably argue that the addition of glycol automatically affects the public's attitude towards the wine.
- 123 Summarising, the promotion featuring Blue Hills 2005 would not have created a wine scandal comparable to the Austrian glycol-wine scandal, because Blue Hills 2005 was neither adulterated nor did it violate any law.

## **II. EVEN IF THE ARTICLES HAD AFFECTED THE COMMERCIALISATION, THE CLAIMANT COULD NOT BE HELD ACCOUNTABLE**

- 124 Even considering that Blue Hills 2005 would not reach satisfactory sales in the promotion, the CLAIMANT could not be held accountable since the RESPONDENT obtained the better position to allay fears in the Equatorianian public.
- 125 In the present case, none of the parties is responsible for the external und baseless interferences of the newspapers. Neither the RESPONDENT nor the CLAIMANT could expect a sensation-seeking newspaper to spread incorrect information. Nevertheless, there was a fair chance to liberate the wine from its negative publicity as there were almost three months left to counteract and to guarantee a profitable promotion. Non-conformity of the wine could therefore not automatically be determined. It was rather questionable whether the CLAIMANT or the RESPONDENT was obliged to liberate Blue Hills 2005 from its negative publicity. According to the economic analysis of law, liability is to be assigned to the party that could have mastered the situation most effectively [*POSNER, pp. 106-108; SCHÄFER/OTT, pp. 412-413; KIRSTEIN, p. 7*].
- 126 It was therefore the RESPONDENT who was obliged to organise a rival press campaign as the newspaper articles appeared in its own country, where it had far more possibilities of influence than the CLAIMANT. AS the CLAIMANT could not be asked to initiate a rival



campaign, it was only obliged to disprove the newspapers' allegation and ensure usability. General usability of the wine could not be questioned since the report of Prof. Ericson states that there are only lawful and harmless substances added in Blue Hills 2005 [*Ericson Report, para. 4, p. 21*]. The report furthermore disproves the newspapers' allegations. Since the CLAIMANT fulfilled its duties and ensured the possibility of a successful promotion, it was the RESPONDENT'S obligation to prevent a loss of profit through instructing the newspapers to disprove the incorrect information. The RESPONDENT in contrary did nothing.

127 The RESPONDENT did not even demonstrate good will as it refused to accept the CLAIMANT'S offer to feature a different wine of the exact same quality [*Claimant's Exhibit No. 15, p. 24*] and simply rejected the CLAIMANT'S concession [*Claimant's Exhibit No. 16, p. 25*].

128 Summarising, as only the RESPONDENT obtained the position to allay fears in the Equatorianian public, it was not the CLAIMANT'S obligation to arrange a rival campaign. The CLAIMANT could therefore not be held accountable in case Blue Hills 2005 had not reached profitable sales in the promotion.

#### **B. THE RESPONDENT COULD NOT REASONABLY RELY ON THE CLAIMANT'S SKILL AND JUDGEMENT**

129 Even regarding the wine unsuitable for the promotion, it was unreasonable for the RESPONDENT to rely on the CLAIMANT'S skill and judgement.

130 According to Art. 35(2)(b) CISG, the seller is held responsible for the goods to be fit for the particular purpose made known, if it was reasonable for the buyer to rely on the seller's skill and judgement. In cases where the buyer's reliance is unreasonable, the goods are considered conforming to the contract disregarding their fitness for the particular purpose.

131 In the present case, the RESPONDENT could not reasonably rely on the CLAIMANT'S skill and judgement as it examined the wine with expertise before purchase **(I)**. The RESPONDENT was furthermore more knowledgeable in accomplishing successful promotions **(II)** and could not in any case rely on the CLAIMANT to predict the arisen difficulties **(III)**.



## I. THE RESPONDENT EXAMINED THE WINE WITH EXPERTISE BEFORE PURCHASE

132 The RESPONDENT cannot argue to have reasonably relied on the CLAIMANT for selection of a suitable wine for the promotion as itself examined and selected Blue Hills 2005 with expertise before the purchase. Reasonable reliance is generally excluded, if the buyer takes part in the selection of the goods, examines the goods or insists on a particular brand before purchase [*KRITZER, Art. 35 para. 9; Schlechtriem/Schwenzer/SCHWENZER (eng.), Art. 35 para. 23; HYLAND, pp. 320-322*].

133 In the case at hand, the RESPONDENT sent experienced personnel to select a suitable wine for the promotion to the Durhan Wine Fair [*Procedural Order No. 2, para. 15, p. 53*]. As the RESPONDENT'S team tasted, examined and selected the brand Blue Hills 2005, the CLAIMANT was not required to choose a product suitable to lead the RESPONDENT'S promotion. The wine praised at the Durhan Wine Fair was the exact same that the CLAIMANT offered the RESPONDENT for purchase [*Procedural Order No. 2, para. 15, p. 53*]. The assurance that the wine has just the right character to take the lead in the promotion [*Claimant's Exhibit No. 2, p. 10*] and that its price is acceptable for a wine of that quality [*Claimant's Exhibit No. 4, p. 12*] further clarifies how firmly the RESPONDENT relied on its *own* selection. The CLAIMANT can therefore not be held responsible for the RESPONDENT'S autonomous selection of Blue Hills 2005 for its promotion.

134 Summarising, the RESPONDENT could not reasonably rely on the CLAIMANT to select a suitable wine for the promotion as itself tasted, examined and selected Blue Hills 2005.

## II. THE RESPONDENT WAS MORE KNOWLEDGEABLE IN ACCOMPLISHING SUCCESSFUL PROMOTIONS

135 The RESPONDENT could not rely on the CLAIMANT to know the required characteristics of a wine leading a promotion in Equatoriana as the CLAIMANT is neither experienced nor knowledgeable in accomplishing successful marketing campaigns.

136 Reasonable reliance is excluded in cases, where the buyer is evidently less knowledgeable and less competent than the buyer [*MüKoBGB/GRUBER, Art. 35 para. 13; Huber/MULLIS, p. 138; LÜDERITZ, pp. 185-186*].

137 The CLAIMANT made clear that it is solely knowledgeable about the wine itself and not about its potential to be successfully merchandised in Equatoriana. In fact, Blue Hills



2005 was to be marketed for the first time in Equatoriana [*Claimant's Exhibit No. 8, p. 16*]. The RESPONDENT could therefore neither rely on the CLAIMANT'S experience nor expect it to know that the lawful addition of diethylene glycol to the wine might cause difficulties for the promotion. The RESPONDENT in contrary is named the largest retailer of wine in Equatoriana [*Statement of Claim, para. 4, p. 4*] and therefore cannot be expected to rely on assistance in marketing.

138 Summarising, the purported difficulties with the promotion do not relate to any objective characteristics of Blue Hills 2005 which the CLAIMANT is knowledgeable about or which it can influence. The CLAIMANT is not knowledgeable about successfully managing a promotion in Equatoriana. Therefore, the RESPONDENT, who is far more knowledgeable, could not reasonably rely on the CLAIMANT to know that the addition of diethylene glycol to the wine might cause difficulties for the promotion in Equatoriana.

### **III. THE RESPONDENT COULD NOT REASONABLY RELY ON THE CLAIMANT TO PREDICT THE ARISEN DIFFICULTIES**

139 It was unreasonable for the RESPONDENT to rely on the CLAIMANT to foresee potential difficulties, simply because Blue Hills 2005 is lawfully sweetened with diethylene glycol.

140 The present situation is comparable to a case held by the Austrian Supreme Court [*OGH, 25 Jan 2006*]. In that case, a Serbian buyer purchased pork liver from an Austrian buyer, who knew that the meat was meant to be sold in Serbia. Although the liver was of perfect quality and complied with EU requirements, Serbian authorities unexpectedly refused the import the meat. The refusal came unexpected as the Austrian seller had already been selling meat of the same quality to Serbia without difficulties. The Serbian buyer claimed damages, since the meat could not be sold in Serbia. The Austrian Supreme Court however held, that the seller could not be expected to know that the Serbian authorities would refuse to import the liver. In consequence, the buyer could not reasonably rely on the seller to have prevented the arisen difficulties. Therefore, the liver was found to conform to the contract according to Art. 35(2)(b) CISG.

141 The alleged suspicion that the wine might not be suitable for the promotion was also not due to its objective characteristics but rather prompted by incorrect newspaper articles. The CLAIMANT could not predict the development of the ill-founded news in Equatoriana through the publication of one single untenable allegation in a sensation-



seeking newspaper of Mediterraneo's [*Claimant's Exhibit No. 10, p. 18*]. It therefore could not reasonably be expected to foresee that the article might affect a marketing campaign, which was planned to take place in a foreign country months ahead.

142 In summary, even if the article affected the suitability of the wine for the promotion, it does not lead to non-conformity, because the RESPONDENT could not reasonably rely on the CLAIMANT to predict difficulties pursuant to Art. 35 (2)(b) CISG.

143 **RESULT OF THE FIFTH ISSUE:** Blue Hills 2005 was fit for the purpose of serving as the leading product in the promotion pursuant to Art. 35 (2)(b) CISG as the newspaper articles did not affect the wine's fitness for the promotion. The RESPONDENT furthermore could not reasonably rely on the CLAIMANT'S skill and judgement.





## REQUEST FOR RELIEF

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

- The Arbitral Proceedings should continue (**FIRST ISSUE**).
- The Arbitral Tribunal has jurisdiction on the grounds of an effective arbitration agreement (**SECOND ISSUE**).
- The RESPONDENT'S breach of the arbitration agreement entails procedural and financial consequences (**THIRD ISSUE**).
- A contract of sale was concluded (**FOURTH ISSUE**).
- Blue Hills 2005 was fit for the particular purpose made known to the CLAIMANT (**FIFTH ISSUE**).

**CERTIFICATE**

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

Freiburg im Breisgau,

6 December 2007

(signed)

Lina Ali

(signed)

Mark A. Czarnecki

(signed)

Max B. Fahr

(signed)

Sebastian Gößling

(signed)

Marc Grün

(signed)

H. Henning Heyne

(signed)

Lenke Schulze

(signed)

Sophie C. Thürk