FIFTEENTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2007 – 2008

MEMORANDUM

FOR

MEDITERRANEO WINE COOPERATIVE

- CLAIMANT -

STEFANIE GREEN KAI MATHAR THORSTEN SALOMON JULIA STRERATH

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE

CENTER FOR TRANSNATIONAL LAW

(CENTRAL)

TEAM MEMBERS:

STEFANIE GREEN KAI MATHAR THORSTEN SALOMON JULIA STRERATH

FIFTEENTH ANNUAL

WILLEM C. VIS

INTERNATIONAL

COMMERCIAL ARBITRATION MOOT

2007 – 2008

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW

PACE UNIVERSITY SCHOOL OF LAW

WHITE PLAINS, NEW YORK

U.S.A.

MOOT CASE NO. 15

LEGAL POSITION

ON BEHALF OF

MEDITERRANEO WINE COOPERATIVE
140 VINEYARD PARK
BLUE HILLS
MEDITERRANEO (CLAIMANT)

AGAINST

EQUATORIANA SUPER MARKETS S.A.
415 CENTRAL BUSINESS CENTRE
OCEANSIDE
EQUATORIANA (RESPONDENT)

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INDEX OF ABBREVIATIONS

§	Section
AAA	American Arbitration Association
Art.	Article
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decision of the German Federal Supreme Court in Civil Matters)
BT-Drs	Bundestag Drucksache
CA	Court of Appeal of England and Wales
cf.	confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-online	Case Law on CISG http://www.cisg-online.ch
Cl's Ex.	CLAIMANT's Exhibit
Co.	Company
Comm. Ct.	Commercial Court of Vindobona, Danubia
Corp.	Cooperation
DAL	Danubian Arbitration Law
EAA 96	English Arbitration Act 1996
ed.	editor(s)
e.g.	exemplum gratia (for example)
et. seq.	et sequentes (and following)
F.3d	Federal Reporter, Third Series
i.e.	id est (that means)
ICC	International Chamber of Commerce
IHR	Internationales Handelsrecht (German Law Journal)
Inc.	Incorporated
JAMS	Judicial Arbitration and Mediation Services
JAMS Rules	JAMS International Arbitration Rules
kg	Kilogram
LCIA	London Court of International Arbitration

LG	Landgericht (Regional Court, Germany)
Lloyd's Rep	Lloyd's Law Reports
MAL	UNCITRAL Model Law on International Arbitration
No.	Number
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OLG	Oberlandesgericht
p.	Page
para.	Paragraph
pp.	Pages
RIW	Recht der Internationalen Wirtschaft (German Law Journal)
P.O.	Procedural Order
S.A.	Société Anonyme, Sociedad Anónima
SchiedsVZ	Die neue Zeitschrift für Schiedsverfahren (German Law Journal)
Sec. Comm.	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat
S.D. N.Y.	United States District Court for the Southern District of New York
SPILA	Swiss Act on Private International Law
St. of Cl.	Statement of Claim
St. of Def.	Statement of Defense
Supr. Ct.	Supreme Court
U.S.	United States Reports
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL EC	UNCITRAL Model Law on Electronic Commerce
UNCITRAL Rules	UNCITRAL Arbitration Rules
v.	versus (against)
VNJTL	Vanderbilt Journal of Transnational Law
YCA	Yearbook of Commercial Arbitration
ZEuP	Zeitschrift für Europäisches Privatrecht (German Law Journal)

ZPO	Zivilprozessordnung (German Code of Civil Procedure)

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STATEMENT OF FACTS

On **1 June 2006**, Mediterraneo Wine Cooperative (hereinafter: CLAIMANT) sends Equatoriana Super Markets S.A. (hereinafter: RESPONDENT) a quote for the purchase of Blue Hills 2005 and offers a discount of between 10% and 15%, depending on the quantity ordered. CLAIMANT also confirms that it would, at the request of RESPONDENT, deliver in several shipments. RESPONDENT answered on **10 June** by sending an email and a letter to CLAIMANT with a signed purchase order including an arbitration clause. The purchase order specifies that RESPONDENT orders 20,000 cases of Blue Hills 2005 for $68.00 per case. RESPONDENT also states that the deadline for closing the contract is 21 June 2006. On the **morning of the 19 June**, CLAIMANT sends the signed purchase order back to RESPONDENT by courier. On the **afternoon of 19 June** CLAIMANT receives an email from RESPONDENT purporting to withdraw its offer to purchase 20,000 cases of Blue Hills 2005 from 10 June 2006 due to newspaper reports that Blue Hills 2005 had been adulterated. On **21 June** RESPONDENT receives the signed purchase order (within the deadline set by REPSONDENT) sent from CLAIMANT on 19 June 2006 (a.m.). Between **15 July and 10 August**, all attempts by CLAIMANT to resolve the dispute, including the confirmation sent to RESPONDENT (a summary report prepared by Professor Sven Ericson from the Wine Research Institute, Mediterraneo) stating that Blue Hills 2005 does not cause a health risk, were unsuccessful. On **21 June 2007** JAMS acknowledges that CLAIMANT has submitted a request for arbitration and sends RESPONDENT notification of CLAIMANT's request for arbitration. CLAIMANT informs JAMS on **10 July** that RESPONDENT has commenced action in the Commercial Court of Vindobona, Danubia.

In view of the above facts, we respectfully make the following submissions on behalf of our client Mediterraneo Wine Cooperative, CLAIMANT, and request the Arbitral Tribunal to hold that:

- The Parties concluded a valid arbitration agreement on 19 June 2006 **[First Issue]**.
- The Arbitral Tribunal must not grant a stay of the arbitral proceedings **[Second Issue]**.
- There are several appropriate consequences the Arbitral Tribunal should consider following RESPONDENT's violation of Art. 17(3) JAMS Rules **[Third Issue]**.
- A contract concerning the sale of Blue Hills 2005 was concluded between CLAIMANT and RESPONDENT **[Fourth Issue]**.
- Blue Hills 2005 is fit for the particular purpose made known to Claimant **[Fifth Issue]**.

FIRST ISSUE: THE PARTIES CONCLUDED A VALID ARBITRATION AGREEMENT ON 19 JUNE 2006.

1 The arbitral process is consensual in nature, for it rests on agreement between the parties (*Lew/Mistelis/Kröll*, para. 6-1; *Brown/Marriott*, para. 4-014; *Carbonneau*, p. 23). In the case at hand, the Parties consented to a valid arbitration agreement on 19 June 2006. The mutual assent of the Parties is demonstrated by RESPONDENT's offer to conclude an arbitration agreement [**A.**] and CLAIMANT's acceptance of this offer [**B.**].

A. RESPONDENT provided a binding offer to conclude an arbitration agreement on 10 June 2006.

2 The arbitration clause contained in para. 13 of RESPONDENT's Purchase Order dated 10 June 2006 represents a binding offer to conclude an arbitration agreement [**I.**] which has not been validly withdrawn by RESPONDENT [**II.**].

I. The arbitration clause in para. 13 of RESPONDENT's Purchase Order dated 10 June 2006 represents a binding offer to conclude an arbitration agreement.

3 On 10 June 2006, RESPONDENT sent an purchase order to CLAIMANT that included in its para. 13 an arbitration clause (*Cl's Ex. No. 5*). The arbitration clause introduced by RESPONDENT is a model arbitration clause from the Judicial Arbitration and Mediation Services (hereinafter: JAMS). It provides that „any dispute, controversy or claim arising out of or relating to this contract […] will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules" (hereinafter: JAMS Rules). By inserting this model clause into para. 13 of the Purchase Order, RESPONDENT opted for arbitration under the JAMS Rules as the arbitration rules applicable to the present arbitral proceedings.

4 The arbitration clause is provided at the very end of the document leading over directly to the signature of Mr. Harald Wolf, RESPONDENT's principal wine buyer. Hence, by inserting and signing the arbitration clause RESPONDENT undoubtedly expressed its intent to be bound to its offer to arbitrate. This leads to the conclusion that RESPONDENT was aware of the consequences of adding the arbitration clause to the Purchase Order. Thus, RESPONDENT issued a binding offer to conclude an arbitration agreement.

II. RESPONDENT has never validly withdrawn its offer to conclude an arbitration agreement.

5 Due to the doctrine of separability, RESPONDENT's offer to arbitrate is to be distinguished from its offer to purchase Blue Hills 2005, also regarding the alleged withdrawal [**1.**]. RESPONDENT has not undertaken any action whatsoever which would even imply that it wanted to retract the

offer to arbitrate [**2.**].

1. According to the doctrine of separability, the withdrawal of an offer to conclude an arbitration agreement has to be separated from the withdrawal of an offer to conclude a sales contract.

6 Regarding the alleged withdrawal, RESPONDENT's offer to conclude an arbitration agreement is independent and is to be distinguished from the offer to purchase Blue Hills 2005 due to the doctrine of separability. An arbitration clause is an autonomous agreement. When two parties enter into a business agreement containing an arbitration clause, they enter into not only one but two agreements: the first of which concerns the business deal and the other dispute resolution by arbitration (*Newman/Hill, p. 85; Lew/Mistelis/Kröll, para. 6-7*). Due to the doctrine of separability the validity of the arbitration agreement is not bound to that of the main contract and vice versa (*Lew/Mistelis/Kröll, para. 6-9*). The arbitration clause is recognised as a separate contract, independent and distinct from the main contract – irrespective of whether the arbitration clause is included in the principal contract or whether it is drafted separately (*Prima Paint v. Flood & Conklin Mfg. Co., (U.S. 1967); Gosset v. Soc. Carapeli (France 1963); Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp. Ltd, (England 1981); Bühring-Uhle, p. 47; Redfern/Hunter, p. 193; Garnett/Gabriel/Waincymer/Epstein, para. 4.2.5*; *Born, p. 56; Carbonneau, p. 24; Lew/Mistelis/Kröll, para. 6-9*). As the arbitral agreement "survives any birth defect or acquired disability of the principal agreement" (*Schwebel, para. 1-60*), the arbitration agreement not only remains valid if the main contract is challenged after conclusion of the contract but also if the main contract is in fact void *ab initio*. The fate of the main contract is therefore irrelevant regarding the validity of the arbitral agreement (*Harbour Assurance Co. Ltd v. Kansa General International Insurance Co. Ltd., (England 1993)*; *Prima Paint v. Flood & Conklin Mfg. Co., (U.S. 1967); Republic of Nicaragua v. Standard Fruit Co., (U.S. 1991); Nicaragua Interocean Shipping Co. v. National Shipping & Trad. Corp., (U.S. 1989); Enrique C. Wellbers S.A.I.C. A.G. v. Extraktionstechnik Gesellschaft für Anlagenbau (Argentina 1988); Fung Sang Trading, Ltd. v. Kai Sun Sea Products and Food Co., Ltd., (Hong Kong 1991); Várady/Barceló/Mehren, p. 125; Holtzmann/Neuhaus, p. 480; Redfern/Hunter, p. 175)*.

7 The doctrine is codified in the applicable arbitration law to the present case. Since Vindobona, Danubia has been determined as the place of arbitration *(St. of Cl., §15)* the Danubian Arbitration Law (hereinafter: DAL) is applicable to the arbitral proceedings as lex loci arbitri. Danubia has adopted the 1985 text of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: MAL) with a single amendment to Art. 8 *(St. of Cl., §18)*. Art. 16(1) s.2 DAL provides that "an arbitration clause which forms part of a contract shall be treated as an agreement

independent of the others terms".

8 The doctrine of separability is also widely recognised and is considered to be one of the true transnational rules of international commercial arbitration (*Holtzmann/Neuhaus, p. 480; Garnett/Gabriel/Waincymer/Epstein, para. 4.2.5; Várady/Barceló/Mehren, para. 76; Brown/Marriott, para. 4-080; Sandrock, p. 47-48; Weigand, UNCITRAL ML, p. 404; Lew/Mistelis/Kröll, para. 6-22; ICC, Award No. 109 (1980))* and is regulated in various statutes and international arbitration rules (*e.g. Section 7 EAA 96; § 1040(1) ZPO; Art. 21(2) UNCITRAL Rules; Art.15(2) AAA Rules; Art.6(4) ICC Rule; Art.23(1) LCIA Rules*).

9 Applying the doctrine of separability to the dispute at hand, the question as to whether an offer to conclude an arbitration agreement was withdrawn must be determined separately from the question as to whether the offer to conclude a sales contract was withdrawn. RESPONDENT must have provided *both*, a withdrawal of its offer to arbitrate and also a withdrawal of its offer to purchase. This leads to the conclusion that even if the Arbitral Tribunal should find that the offer to purchase was withdrawn by RESPONDENT, i.e. the sales contract is inexistent *ab initio*, the offer to arbitrate remains valid.

2. Any alleged withdrawal by RESPONDENT was restricted to its offer to purchase.

10 RESPONDENT did neither expressly nor impliedly withdraw its offer to conclude an arbitration agreement. RESPONDENT's alleged (but unsuccessful) withdrawal was restricted to its offer to purchase Blue Hills 2005 as it was due to the fact that the wine was supposed to be "not fit for the particular purpose". In its e-mail from 18 June 2006, RESPONDENT claims that featuring Blue Hills 2005 "would have created for [it] a commercial catastrophe" and that it "cannot sell wine to [its] customers that has been adulterated" (*Cl's Ex. No. 9*). In the light of these statements, the wording chosen by RESPONDENT in its e-mail of 18 June 2006 "we are withdrawing the offer to purchase" (*Cl's Ex. No. 9*) makes it even more clear and unmistakeable that RESPONDENT only referred to the offer to purchase Blue Hills 2005. Thus, RESPONDENT did not expressly withdraw its offer to arbitrate.

11 Nor did RESPONDENT withdraw the offer to conclude an arbitration agreement impliedly. The Parties never discussed the issue of dispute resolution. Arbitration was initially RESPONDENT's choice of dispute resolution as the arbitration clause was inserted into the Purchase Order on RESPONDENT's own initiative. The Purchase Order – including RESPONDENT's offer to conclude an arbitration agreement – was enclosed in its letter sent both by e-mail attachment *and* via courier (*Cl's Ex. No. 5, §13*). Previous communication between the parties, prior to RESPONDENT's offer to arbitrate, was mostly conducted via e-mail *or* courier. It is therefore of utmost significance that RESPONDENT did not merely rely on e-mail technology but chose to

send its offer to arbitrate via e-mail *and* via courier. This would rule out the possibility that should the e-mail not reach CLAIMANT, the letter sent per courier would. Therefore, CLAIMANT could reasonably expect RESPONDENT to be equally, if not more thorough when attempting to revoke that offer. Due to this high formal standard set by RESPONDENT regarding the importance of the offer to arbitrate, CLAIMANT had to assume that if RESPONDENT had intended to withdraw its offer to arbitrate, it would have made an unmistakable referral to its offer to arbitrate. But CLAIMANT's expectations were not satisfied. The e-mail could have, at least, contained wording to the effect of "we hereby withdraw all statements pertaining to any contractual relationship whatsoever". Nothing even remotely to this effect was written.

12 The wording of the arbitration clause introduced by RESPONDENT makes it even less plausible that RESPONDENT's statement in the e-mail from 10 June 2006 was to be interpreted as being a withdrawal of the offer to arbitrate. The arbitration clause expressly provides that such disputes as those regarding the "formation of contracts" should be resolved by means of arbitration. According to its wording, the question whether RESPONDENT has validly withdrawn the sales contract falls within the scope of the arbitration clause. It is therefore evident that RESPONDENT, in the case of any dispute particularly regarding the formation of the sales contract between the parties, also wished that it be resolved by arbitration. This supports the conclusion that RESPONDENT aimed at withdrawing its offer to conclude a sales contract and not at withdrawing the offer to conclude an arbitration agreement. Therefore, RESPONDENT's offer to conclude an arbitration agreement was never withdrawn.

B. CLAIMANT accepted RESPONDENT's offer to conclude an arbitration agreement on 19 June 2006.

13 Since Mr. Steven Cox, CLAIMANT's sales manager, placed its signature underneath the arbitration clause, CLAIMANT accepted RESPONDENT's offer to arbitrate. CLAIMANT dispatched this acceptance on 19 June 2006. The fact that both signatures, Mr. Wolf's on behalf of RESPONDENT and Mr. Cox's on behalf of CLAIMANT, can be found in the Purchase Order directly underneath the arbitration clause underlines the mutual assent of the Parties and manifests their agreement to refer all disputes to arbitration.

C. The Parties' arbitration agreement satisfies all formal requirements.

14 The Parties' agreement to arbitrate satisfies all formal requirements according to the DAL, as the applicable arbitration law, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NY Convention). The latter, to which Equatoriana and Mediterraneo are party, contains a uniform substantive rule on the form of arbitration agreements.

Both Art. II(1) NY Convention and Art. 7(2) DAL require the arbitration agreement to be in writing and consider this requirement as fulfilled if the agreement is contained in a document signed by both parties. The Parties' arbitration agreement is contained in the Purchase Order that constitutes a written document signed by RESPONDENT and CLAIMANT. Therefore, the Parties' arbitration agreement fulfils all formal requirements.

SECOND ISSUE: THE ARBITRAL TRIBUNAL MUST NOT GRANT A STAY OF THE ARBITRAL PROCEEDINGS.

15 Art. 8(3) DAL provides that the arbitral tribunal may continue the arbitration and render an award while the issue is pending before a state court. In the case at hand the Arbitral Tribunal has to exercise this discretion and refrain from granting a stay for several reasons. First, the Arbitral Tribunal must not grant a stay of the arbitral proceedings based on the pending state court proceedings as this would violate the Parties' procedural agreement [**A.**]. Second, by granting a stay the Arbitral Tribunal would act against the principle of procedural economy since RESPONDENT's action for declaratory judgement has no chance of success [**B.**]. Finally, RESPONDENT requests a stay to delay the current arbitral proceedings. Thus, the Arbitral Tribunal should act in conformity with the purpose of Art. 8(3) DAL and continue the arbitral procedures to prevent RESPONDENT to continue its delaying tactics [**C.**].

A. The Arbitral Tribunal must not grant a stay as this would violate the arbitral procedure agreed upon by the Parties.

16 In the case at hand the Arbitral Tribunal must not grant a stay of the arbitral proceedings as it would otherwise violate the Parties' procedural agreement. By opting for Art. 17(3) JAMS Rules to apply, RESPONDENT and CLAIMANT validly agreed that the Arbitral Tribunal should be the first authority to decide on the question of its jurisdiction. By granting a stay the Arbitral Tribunal would contradict this agreement [**I.**]. Due to the fact that the Arbitral Tribunal is bound by the Parties' stipulation in Art. 17(3) JAMS Rules, it must refrain from granting a stay [**II.**].

I. A stay of arbitral proceedings would contradict the Parties' agreement in Art. 17(3) JAMS Rules

17 By agreeing on Art. 17(3) JAMS Rules the Parties the Parties clearly wanted the Arbitral Tribunal and not the state courts to be the first to decide upon the Arbitral Tribunal's jurisdiction. By granting a stay to allow RESPONDENT to proceed with its application before the Comm. Ct. the Arbitral Tribunal would frustrate the common intentions of the Parties.

18 As a result of the stipulation of the Parties in Art. 17(3) JAMS Rules "the Parties will be treated as

having agreed not to apply to any court or other judicial authority for any relief regarding the Tribunal's jurisdiction". Art. 17(3) JAMS Rules does not prevent all applications before state courts as it contains three exceptions from the general rule. First, an action before court is admissible if all Parties agreed to litigate. Second, an application may also be brought if there has been a prior authorization by the Arbitral Tribunal. Third, Art. 17(3) JAMS Rules allows the Parties to apply to a state court in case the arbitral tribunal has already ruled on the objection to its jurisdiction. This last exception clearly demonstrates the Parties' intention that – under normal circumstances – the Arbitral Tribunal should rule on any question as to its jurisdiction *before* any state court may.

19 Thus, by granting a stay and thereby allowing RESPONDENT to proceed with its application for declaratory judgement the Arbitral Tribunal would act contrary to the Parties stipulations regarding the arbitral procedure in Art. 17(3) JAMS Rules.

II. The Tribunal must give effect to the Parties' agreement in Art. 17(3) JAMS Rules by refraining from granting a stay

20 The Arbitral Tribunal is bound by the procedural stipulation in Art. 17(3) JAMS Rules and is therefore obliged to continue the arbitral proceedings as it is envisioned by Art. 8(3) DAL.

21 As a general rule, Art. 19(1) DAL establishes the principle of party autonomy in arbitration by recognising the parties' freedom to define the rules concerning the arbitral procedure. These rules agreed upon by the Parties are binding for arbitral tribunals *(Musielak-Voit, § 1042, para. 33; Zöller-Geimer, §1042, para. 22; Redfern/Hunter, para. 6-03)*. Pursuant to Art. 19(1) DAL the parties are free to agree on the procedure to be followed by the arbitrators subject only to the mandatory provisions of the DAL. In the case at hand the Arbitral Tribunal has to give effect to the agreement of the Parties in Art. 17(3) JAMS Rules as it is in accordance with the mandatory provisions of the DAL [**1.**]. Even if Art. 17(3) JAMS Rules is found to violate mandatory provisions of the DAL, the Tribunal still has to abide to the agreement of the Parties due to its duty to render an enforceable award [**2.**].

1. Art. 17(3) JAMS Rules constitutes a valid agreement concerning the arbitral procedure pursuant to Art. 19(1) DAL as it is in accordance with the mandatory provisions of the DAL.

22 The Parties' agreement in Art. 17(3) JAMS Rules does not violate any mandatory provisions of the DAL. In the case at hand, the only provision of the DAL which is modified by the agreement of the Parties in Art. 17(3) JAMS Rules is Art. 8(2) DAL. Pursuant to this provision the parties may apply to a state court prior to the constitution of the arbitral tribunal to determine whether or not arbitration is admissible. Art. 17(3) JAMS Rules only allows state court proceedings

concerning the question of the jurisdiction of the arbitral tribunal if certain requirements are fulfilled (*supra at 21*). When considering whether Art. 8(2) DAL has a mandatory character, the Arbitral Tribunal should bear in mind that due to the outstanding importance of the principle of party autonomy in international arbitration, the Parties should be given the widest possible discretion as to the conduct of the proceedings (*UNCITRAL, Analytical Com., p. 124*). Thus, only those provisions of the DAL should be considered mandatory, where the purpose of these provisions clearly objects to the possibility of a modification by the parties.

23 Here, the purpose of Art. 8(2) DAL does not in any way suggest that the present modification by virtue of Art. 17(3) JAMS Rules should not be allowed. The only purpose of Art. 8(2) DAL is to uphold procedural economy by providing the possibility of an early decision on the jurisdiction issue *(see concerning § 1032(2) ZPO, being the equivalent of Art. 8(2) DAL: BT-Drs. 13/5274, p. 38)*. There is no reason why the Parties should not have the possibility to jointly modify this approach to procedural economy.

24 This understanding of Art. 8(2) DAL as not serving a mandatory purpose is underlined by the fact that most arbitration laws do not contain a similar provision. In fact, by agreeing on Art. 17(3) JAMS Rules the Parties adapted the position that most arbitration laws take towards the possibility to apply to a state court regarding the Arbitral Tribunal's jurisdiction: It is generally only admissible after the arbitral tribunal has ruled on the objection to its jurisdiction (cf. Art. 16(3) MAL; Sec. 32 EAA). This approach expresses the widely acknowledged negative effect of the principle of competence-competence pursuant to which the arbitrators are entitled to be the first to determine their jurisdiction *(Fouchard/Gaillard/Goldman, para. 671; Barcelo, pp. 5, 6)*. It can barely be believed that, when all these arbitration laws do not contain a provision like Art. 8(2) DAL, this provision is of such an indispensable character as to not being amendable by an agreement of the parties.

25 To conclude, the Parties' agreement in Art. 17(3) JAMS Rules constitutes a valid agreement concerning the arbitral procedure pursuant to Art. 19(1) DAL as it is in accordance with the mandatory provisions of the DAL.

2. Even if Art. 17(3) JAMS Rules is found to violate mandatory provisions of the DAL, the Tribunal still has to abide to the agreement of the Parties due to its duty to render an enforceable award.

26 Even if the Tribunal finds that Art. 17(3) JAMS Rules is not in accordance with mandatory provisions of the DAL, it must refrain from granting a stay. The Arbitral Tribunal is bound by the procedural stipulation of the Parties due to its duty to render an enforceable award [**a.**]. This is the case, whether or not the Arbitral Tribunal finds that Art. 17(3) JAMS Rules is contrary to

mandatory provisions of the DAL [**b.**].

a. The Arbitral Tribunal is bound by the procedural stipulation of the Parties in Art. 17(3) JAMS Rules due to its duty to render an enforceable award.

27 In international arbitration, the arbitral tribunal is under a duty to render an enforceable award (*Lew/Mistellis/Kröll para. 26-4, Redfern/Hunter, para. 10-06*). As the NY Convention provides for the unenforceability of awards if the arbitral procedure was not in accordance with the agreement of the parties (Art. V(1)(d) NY Convention), the Tribunal has to give effect to procedural stipulations such as Art. 17(3) JAMS Rules in the case at hand.

28 The only exception to this rule applies, if enforcement of the award rendered in accordance with the parties' stipulation would be contrary to the public policy of the enforcement state. This follows from Art. V(2)(b) NY Convention pursuant to which enforcement of the award may be refused if its enforcement would be contrary to the international public policy of the state where enforcement is sought. The Parties' agreement, however, does not in any way raise doubts to as its conformity with the international public policy of possible enforcement states. It is commonly acknowledged that the defence to the enforcement of an award on the ground of public policy as expressed in Art. V(2)(b) NY Convention is to be construed very narrowly (Fouchard/Gaillard/Goldman, para. 1713). Thus, enforcement of an award on this ground may only be refused, "where the enforcement would violate the forum state's most basic notions of morality and justice" (*Lew/Mistellis/Kröll, para. 26-114; Parsons & Whittemore Overseas Co., Inc. v. Société générale de l'industrie du papier (RAKTA), (U.S. 1974)*). As Art. 17(3) JAMS Rules does not violate any fundamental rights of the Parties, international public policy of possible enforcement states is not affected.

29 Thus, the duty of the Arbitral Tribunal to render an enforceable award obliges it to give effect to the Parties agreement in Art. 17(3) JAMS Rules.

b. The duty of the Arbitral Tribunal to give effect to the Parties agreement exists even if it finds that Art. 17(3) JAMS Rules is contrary to mandatory provisions of the DAL.

30 The general rule that the Arbitral Tribunal has to give effect to the Parties' procedural stipulations applies even in case it finds that the agreement in Art. 17(3) JAMS Rules does violate mandatory provisions of the DAL.

31 It is widely acknowledged that an award still has to be enforced under the NY Convention even if an agreement as to the arbitral procedure violates a mandatory provision of the law of the seat of the arbitration (*Fouchard/Gaillard/Goldman, para. 1711; van den Berg, p. 330*). This approach is in conformity with the intentions of the authors of the NYC which was to provide the parties with the widest possible discretion as to the conduct of the proceedings (*cf.*

Fouchard/Gaillard/Goldman, para. 1702: "Their [the author's] intention was undoubtedly to ensure that the parties' agreement should prevail over the provisions – mandatory or not – of the law of the seat"). This intention would be frustrated if one would deny enforcement on the ground that the parties' agreement violates a mandatory provision of the lex arbitri. Moreover, if enforcement would always have to be denied where a procedural stipulation of the parties violates a mandatory provision of the law of the seat, national peculiarities would affect the international enforceability of the award (*Stein/Jonas-Schlosser, § 1042 para. 3*).

32 It could be argued that the enforceability of the award is also endangered if Art. 17(3) JAMS Rules violates mandatory provisions of the law of the seat of arbitration because the award may be set aside on that ground. This, however, does not lead to a different assessment of the situation. In such a case, the Arbitral Tribunal would be faced with two alternatives: Disregard the agreement of the parties and endanger the enforceability of the award under the NY Convention or honour the intentions of the Parties and risk a set-aside proceeding. In view of the fact that the principle of party autonomy is the very basis of international arbitration the tribunal clearly has to choose the first alternative: It has to give effect to the express agreement of the parties. It has to give effect to Art. 17(3) JAMS Rules.

B. Granting a stay would mean a violation of the principle of procedural economy.

33 Staying the arbitral proceedings delays the arbitration and thereby affects the principle of procedural economy. Therefore, arbitral tribunals may only grant stay of arbitral proceedings in favour of pending court proceedings if the latter will most likely be successful [**I.**]. Therefore, a stay of arbitral proceedings may only be granted if RESPONDENT's action for declaratory judgement will most likely be successful. This, however, is not the case [**II.**].

I. Due to the principle of procedural economy, arbitral tribunals may only grant a stay of the proceedings where the pending court proceedings will most likely be successful.

34 If an arbitral tribunal is faced with the question of whether it should stay the arbitral proceedings in case of pending court proceedings, it has to bear in mind that it is under a duty to ensure a speedy resolution of the dispute. The arbitrator has to make sure that the arbitration is carried out with reasonable speed (*Redfern/Hunter, para. 5-23*; *Sutton/Kendall/Gill, para 4-148*). This duty arises from the principle of procedural economy, which is one of the most basic maxims of international arbitration *(Berger, Set-Off, p. 69*). The importance of this duty is underlined by the fact that most arbitration laws contain provisions obliging the arbitrators to act without undue delay (cf. Art. 14(1) DAL). Furthermore, a delay in the course of the arbitration does not only lead to a waste of time, but may also have serious financial consequences for the parties

(Redfern/Hunter, para. 5-23). "Justice delayed is justice denied" (Redfern/Hunter, para. 5-23).

35 Therefore, an arbitral tribunal should only grant a stay where there is a compelling reason to do so (*4P 64/2004 (SWITZERLAND 2004)*). From the perspective of procedural economy, the only possible reason could be if the arbitral tribunal is convinced that the pending application for declaratory judgement will be successful. Otherwise the arbitral tribunal would be wasting time by waiting for a decision which possibly just leads to the result that the arbitral proceedings should continue. In view of this fact, granting a stay without such a compelling reason would constitute a violation of the arbitrator's duty to ensure a speedy resolution of the dispute and thus of the principle of procedural economy. Hence, a stay may only be granted where the pending application for declaratory judgement will most likely be successful.

II. In the case at hand, the Arbitral Tribunal may not grant a stay as the application before the Commercial Court of Vindobona has no chance of success.

36 In the case at hand a stay may not be granted as the application for declaratory judgement before the Comm. Ct. has no chance of success. Due to the Parties' agreement as expressed in Art. 17(3) JAMS Rules the Comm. Ct. is not competent to decide on RESPONDENT's action for declaratory judgement [**1.**]. Even if the Tribunal should find that the Comm. Ct. is competent to decide on RESPONDENT's application for declaratory judgement, RESPONDENT's application has no chance of success since it is clearly unfounded [**2.**].

1. Due to the Parties' agreement as expressed in Art. 17(3) JAMS Rules the Commercial Court of Vindobona is not competent to decide on RESPONDENT's action for declaratory judgement.

As shown above *(supra at 21)*, RESPONDENT and CLAIMANT agreed that an action for declaratory judgement may only be brought in the cases specified in Art. 17(3) JAMS Rules. These requirements are not fulfilled in the instant case [**1.**]. Therefore, the Comm. Ct. of Vindobona is not competent to decide on RESPONDENT's action for declaratory judgement as it is bound by the Parties' agreement [**2.**].

a. The Parties agreed that an action for declaratory judgement may only be brought under the requirements specified in Art. 17(3) JAMS Rules.

37 The Parties agreed that an action for declaratory judgement may only be brought under the requirements specified in Art. 17(3) JAMS Rules. These requirements are not met in the instant case. There was neither a written agreement between RESPONDENT and CLAIMANT which authorized RESPONDENT to commence legal action before the Comm. Ct. nor has RESPONDENT been authorized by the Arbitral Tribunal. In addition, the Arbitral Tribunal has

not yet ruled on RESPONDENT's objection to its jurisdiction.

38 Therefore, according to the Parties' agreement as expressed in Art. 17(3) JAMS Rules RESPONDENT was not allowed to apply to the Comm. Ct. for a declaratory judgement.

b. The Commercial Court has no jurisdiction to decide on RESPONDENT's application for declaratory judgement as it is bound by the Parties' agreement.

39 The competence of the Comm. Ct. rested on Art. 8(2) DAL. By validly agreeing not to apply to any state court regarding the question of jurisdiction of the Arbitral Tribunal the Parties excluded the competence of the Comm. Ct. to hear the application. Therefore, the court will declare that it lacks jurisdiction to rule on the question of validity of the arbitration agreement.

III. Additionally, RESPONDENT's action for declaratory judgement is clearly unfounded.

40 Even if the Tribunal should find that the Comm. Ct. is competent to decide on RESPONDENT's action for declaratory judgement, RESPONDENT's application has no chance of success since it is clearly unfounded. RESPONDENT challenges the validity of the arbitration agreement concluded between the Parties. However, as shown above, RESPONDENT and CLAIMANT have in fact concluded a valid arbitration agreement. Pursuant to this agreement "any dispute, controversy or claim arising […] will be referred to and finally determined by arbitration" *(St. of Cl., §17)*. Thus, the application before the Comm. Ct. is without merits.

C. In addition, the Arbitral Tribunal should act in conformity with the purpose of Art. 8(3) DAL and continue the arbitral procedures to prevent RESPONDENT from benefiting from its delaying tactics

41 The Arbitral Tribunal should not grant a stay because RESPONDENT's application to the Comm. Ct. merely constitutes a delaying tactic. By granting a stay the Arbitral Tribunal would not only support this bad faith procedural conduct, it would also act contrary to the spirit and purpose of Art. 8(3) DAL, which allows the arbitral proceedings to be continued despite pendency of an application under Art. 8(2) DAL.

42 By applying to the Comm. Ct. RESPONDENT obviously tries to delay the arbitral proceedings. There is no objective reason why the Comm. Ct. and not the Arbitral Tribunal should decide on the question of the Arbitral Tribunal's jurisdiction first. In fact, if RESPONDENT is convinced that there is no arbitration clause why not let the Arbitral Tribunal decide? A decision of the Tribunal that it has no jurisdiction would benefit RESPONDENT's interests even more than a decision from the Comm. Ct. as only the former will provide RESPONDENT with legal certainty. This is so because if the Arbitral Tribunal denies that it has jurisdiction, CLAIMANT will have no

recourse to the state courts to challenge this decision (*Holzmann/Neuhaus, p. 486*). If, on the other hand, the Comm. Ct. decides that the Arbitral Tribunal lacks jurisdiction, an award rendered despite this ruling may nevertheless be enforced under the NY Convention. A decision of the Arbitral Tribunal that it has jurisdiction would also not impair RESPONDENT's situation, as it would be subject to subsequent court review pursuant to Art. 16(3)(2) DAL. Thus, there is no objective reason why the Arbitral Tribunal should not decide on the validity of the arbitration agreement.

43 Furthermore, Art. 8(2) DAL is meant to give the parties the opportunity to have the question of jurisdiction decided by a court *before* the Arbitral Tribunal is constituted. But here the Arbitral Tribunal is ready to decide on the question itself. The fact that RESPONDENT persist on its application before the Comm. Ct. can therefore only be seen as an attempt to delay the proceedings. It is generally acknowledged that, to preserve the integrity and efficiency of the arbitration process, it is necessary to eliminate such delaying tactics whenever possible *(Fré, p. 10; Berger, p. 374)*. In the case at hand the Arbitral Tribunal is equipped with an effective means to counter RESPONDENT's attempt to obstruct the proceedings. Pursuant to Art. 8(3) DAL it may continue the arbitral proceedings despite pendency of an application for declaratory judgement. The very purpose of provisions like Art. 8(3) DAL is to contribute to a prompt resolution of the dispute by preventing delaying tactics (see concerning Art. 8(2) MAL being the equivalent to Art. 8(3) DAL; Holtzmann/Neuhaus, p. 306). The Arbitral Tribunal should therefore act in conformity with the purpose of Art. 8(3) DAL and should not support RESPONDENT's delaying tactics by granting a stay.

THIRD ISSUE: THERE ARE SEVERAL APPROPRIATE COSEQUENCES THE ARBITRAL TRIBUNAL SHOULD CONSIDER FOLLOWING RESPONDENT'S VIOLATION OF ART. 17(3) JAMS RULES.

44 By commencing litigation in the Comm. Ct. of Vindobona, Danubia, RESPONDENT violated Art. 17(3) JAMS Rules and is thereby in conflict with the Parties' arbitration agreement. Pursuant to Art. 27(3) JAMS Rules, tribunals may draw the inferences that they consider appropriate if a party fails to comply with any provision of the JAMS Rules. To establish legal certainty, the Arbitral Tribunal should consider to render an interim award on jurisdiction dealing with RESPONDENT's objection to the Arbitral Tribunal [**A.**]. Furthermore, the Arbitral Tribunal should exercise its discretionary power given by Art. 27(3) JAMS Rules in the way that it orders RESPONDENT to withdraw its application to the Comm. Ct. [**B.**] and it should further take RESPONDENT's misconduct into consideration whilst allocating the costs of arbitration [**C.**].

Additionally, CLAIMANT should be awarded damages resulting from RESPONDENT's breach of the arbitration agreement [**D.**].

A. The Arbitral Tribunal should consider rendering an interim award on jurisdiction dealing with RESPONDENT's objection to the Arbitral Tribunal's jurisdiction.

45 For reasons of legal certainty the Arbitral Tribunal should render an interim award on jurisdiction. Pursuant to Art. 16(3)(1) DAL, the Arbitral Tribunal may rule on a plea concerning its jurisdiction in the final award or as a preliminary question. In practice, when jurisdiction is challenged arbitration tribunals often opt for rendering a preliminary decision on jurisdiction so that this issue is finally settled at an early stage (*Lew/Mistelis/Kröll, para. 14-25*). If the Arbitral Tribunal should choose to rule on RESPONDENT's plea as a preliminary question this decision confirming its jurisdiction may be issued as an interim award (*cf. Berger, p. 589*). This ruling on jurisdiction by the Arbitral Tribunal will be binding on the Parties (*cf. Redfern/Hunter, para. 5-48*). It is thus not subject to an action for setting aside but subject to immediate review by the courts of law by way of a special appeal procedure according to Art. 16(3)(2) DAL. The court's decision is subject to no further appeal. Therefore, by rendering an interim award on jurisdiction the Arbitral Tribunal would allow for legal certainty at an early stage. This would be in the interests of all – RESPONDENT, CLAIMANT and the Arbitral Tribunal itself.

B. The Arbitral Tribunal should consider ordering RESPONDENT to withdraw its application to the Commercial Court of Vindobona, Danubia.

46 The Arbitral Tribunal should order RESPONDENT to withdraw its application to the Comm. Ct. of Vindobona, Danubia. It is of utmost importance that the arbitration is conducted in accordance with the procedure agreed upon by the Parties since otherwise recognition and enforcement of the final arbitral award may be refused (Art. V(1)(d) NY Convention). RESPONDENT's application to the Comm. Ct. is in violation of the agreed arbitral procedure. This causes the enforcement of the arbitral award to be endangered. Following from the principle of procedural economy, the Arbitral Tribunal is obliged to ensure for an recognisable and enforceable award. To re-establish the arbitral procedure to be in accordance with the Parties' agreement, the Arbitral Tribunal should prompt RESPONDENT to withdraw its application to the Comm. Ct. by way of direction.

C. The Arbitral Tribunal should take RESPONDENT's violation of the JAMS Rules into consideration when deciding on the allocation of costs.

47 The Arbitral Tribunal should exercise its discretion under Art. 27(3) JAMS Rules and order RESPONDENT to bear a substantial portion of the costs of arbitration, due to its non-compliance with the JAMS Rules. In any event, the Arbitral Tribunal should take into consideration the

additional legal expenses for CLAIMANT due to RESPONDENT's procedural misconduct.

48 In principle, the costs of the arbitration are borne by the unsuccessful party (*Berger, p. 617; Holtzmann/Neuhaus, p. 629*). However, Art. 34(4) JAMS Rules provides the Arbitral Tribunal with the discretionary power to apportion such costs among the parties "taking into account the circumstances of the case". This provision reflects the emerging trend that in allocating costs between the parties, their attitude during the proceedings is to be taken into account (*cf. Lew/Mistelis/Kröll, para. 24-82; ICC Award No. 7006 (1992)*). The Arbitral Tribunal may use the allocation of costs to encourage efficient conduct of the proceedings and discourage unreasonable behaviour, such as e.g. needless complication of the proceedings or causation of substantial delay and costs by a party (*ICC Award No. 8486 para. 26, YCA Vol. XXIVa 1999 p. 172; ICC Award No. 7006 of 1992, YCA Vol. XVIII 1993, 58, 67; ICC Award No. 4629 (1989); ICC Award No. 6527 (1991); ICC Award No. 5759 (1989)*).

49 Taking into account RESPONDENT's misconduct, the Arbitral Tribunal should exercise its discretion and apportion the costs of arbitration to the detriment of RESPONDENT. In initiating litigation before the Comm. Ct., RESPONDENT not only complicated and delayed proceedings but also incurred superfluous costs for CLAIMANT. The Arbitral Tribunal should therefore apportion the costs so that RESPONDENT bares the costs caused by any delay of the arbitral proceedings, CLAIMANT's additional costs for the court proceedings and CLAIMANT's costs for legal representatives during the court proceedings. This apportionment of costs should be considered reasonable under Art. 34(4) JAMS Rules. Thus, the Tribunal should rule that RESPONDENT bears a substantial portion of the costs.

D. CLAIMANT should be awarded damages for RESPONDENT's breach of the arbitration agreement.

50 Additionally, the Arbitral Tribunal should award damages to CLAIMANT for the additional legal fees and costs to be incurred in defending or resisting the breaching proceedings of RESPONDENT. The Parties' arbitration clause, i.e. the JAMS model clause, calls for "any dispute, controversy or claim arising out of or relating to this contract" to be referred to arbitration. This arbitration clause not only allows the Arbitral Tribunal to decide on the merits of the case but also provides the Arbitral Tribunal with the authority to decide on issues "relating to" the contract. The JAMS model clause can be labelled a broad arbitration clause (*cf. Várady/Barceló/von Mehren, p. 171; Michele Amoruso E Figli v. Fisheries Development Corp., 499 F.Supp. 1074, 1080 (S.D.N.Y. 1980); Prima paint Corp. v. Flood & Conklin Mfg. Co.,(U.S. 1967)*).

51 The costs and fees of RESPONDENT's unlawful litigation must be considered as being "related

to" the Parties' contract as they are caused by RESPONDENT's misestimation of the question whether the Arbitral Tribunal or the courts of law are competent to decide on the merits of the case. The arbitration clause confers jurisdiction to the Arbitral Tribunal to award damages to CLAIMANT resulting from RESPONDENT's violation of the arbitration rules. The Arbitral Tribunal should decide on what damages CLAIMANT may recover due to the fact that it is in the best position to decide and quantify what damages flowed from the breach of the arbitration agreement. Hence, the Arbitral Tribunal should consider awarding the legal costs and fees of the court proceedings as damages to CLAIMANT.

FOURTH ISSUE: A SALES CONTRACT WAS CONCLUDED BETWEEN CLAIMANT AND RESPONDENT

52 The determination of the applicable law according to Art. 28(2) DAL leads to the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG) and the UNCITRAL Model Law on Electronic Commerce (hereinafter: UNCITRAL EC) [**A.**]. Following the provisions of the CISG and the UNCITRAL EC a contract concerning the sale of Blue Hills 2005 was concluded between CLAIMANT and RESPONDENT [**B.**].

A. Pursuant to Art. 28(2) DAL, the determination of the applicable law leads to the CISG and the UNCITRAL Model Law on Electronic Commerce.

53 As the Parties failed to designate the law applicable to the merits of this dispute (*St. of Cl., §15*), it is up to the arbitral tribunal to determine the law applicable to the merits of the dispute (*cf. Weigand-Roth, p. 1254*). Art. 28(2) DAL states that, in the absence of an implied or express choice of law by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Art. 1(1)(a) CISG sets "autonomous" requirements for the application of the CISG, dispensing with recourse to domestic conflict of laws rule of the forum for matters regulated in the CISG (*Schlechtriem/Schwenzer-Schlechtriem, Art. 1, para. 32*). The CISG is positive law which is mandatory to the courts in both countries, Equatoriana and Mediterraneo (*P.O. No. 2, §6*).

54 Pursuant to Art. 1(1)(a) CISG, the Convention applies to sales contracts between parties whose places of business are in different Contracting States. Both Equatoriana and Mediterraneo are parties to the CISG *(St. of Cl., §15)*, but neither of them has made any declarations or reservations to the CISG (*P.O. No. 2, §5)*. Since CLAIMANT and RESPONDENT have their seats of business in different Contracting States, the present contract is an international sales contract in the sense of Art. 1(1)(a) CISG. Consequently, all requirements of Art. 1(1)(a) CISG are fulfilled and therefore the CISG is the applicable law to the sales contract.

55 The CISG is amended by the UNCITRAL EC. Since Equatoriana and Mediterraneo have adopted the UNCITRAL EC (*St. of Cl., §16*), this convention is likewise applicable to the present sales contract. Given that this Model Law does not intend to overrule provisions of national law (*UNCITRAL EC Guide, p. 56*) it may be used as a tool of interpreting existing international conventions (*UNCITRAL EC Guide, p. 17*). The UNCITRAL EC is not supposed to be seen as *lex specialis* to the CISG. In case of doubt, it is assumed that the CISG, by virtue of Art. 20 UNCITRAL EC, takes priority to the UNCITRAL EC (*Hilberg, p. 19*). Therefore concerning the provisions of the CISG the UNCITRAL EC needs to be seen as an addendum with regard to the use of electronic commerce. The Arbitral Tribunal shall determine the CISG and the UNCITRAL EC as the law applicable.

B. A sales contract was concluded between CLAIMANT and RESPONDENT.

56 On 10 June 2006, CLAIMANT and RESPONDENT concluded a sales contract for Blue Hills 2005 [**I.**]. Even if the Arbitral Tribunal should find that there was no conclusion of contract on 10 June 2006, the Parties concluded a sales contract on 21 June 2006 [**II.**].

I. A contract concerning the sale of Blue Hills 2005 was concluded between CLAIMANT and RESPONDENT on 10 June 2006.

57 The Parties concluded a sales contract with their exchange of letters of 1 and 10 of June 2006. CLAIMANT included an offer for the sale of Blue Hills 2005 in its letter dated 1 June 2006 [**1.**]. This offer was validly accepted by RESPONDENT on 10 June 2006 [**2.**]. The Purchase Order enclosed does not affect the conclusion of the initial contract [**3.**]

1. CLAIMANT made an offer for the sale of Blue Hills 2005 on 1 June 2006.

58 The letter of 1 June 2006 (*Cl's Ex. No.3*) constitutes CLAIMANT's offer for the sale of Blue Hills 2005. Pursuant to Art. 14(1)(1) CISG, a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite "if it indicates the goods and expressly […] makes provision for determining the quantity and the price", Art. 14(1)(2) CISG. While meeting at the Durhan wine fair in May 2006, RESPONDENT showed particular interest in CLAIMANT's Blue Hills 2005. Subsequent to the fair, there was a discussion as to the amount that might be ordered and the price (*St. of Cl., §5*). In its letter of 1 June 2006 CLAIMANT states that it would grant RESPONDENT a certain discount on orders of Blue Hills 2005 for a quantity of either 10.000 or 20.000 cases (*Cl's Ex. No. 3*). Thereby, CLAIMANT invited RESPONDENT to buy either 10,000 cases for US$ 72.00 per case or 20,000 cases for US$ 68.00 per case. As CLAIMANT's offer indicates quantity and price of the goods, it is sufficiently definite.

59 Pursuant to Art. 15(1) CISG, an offer becomes effective when it reaches the offeree. As regards to the meaning of "reaching" Art. 24 CISG is applicable. To be effective, non-oral declarations must be delivered to the addressee "personally [or] to his place of business" (*Schlechtriem/Schwenzer-Schlechtriem, Art.24 para. 9; Achilles, Art. 24 para. 3; MüKo/HGB-Ferrari, Art. 24 para. 8*). Since CLAIMANT's offer reached RESPONDENT in the period between 1 and 10 June 2006 it became effective by 10 June 2006 at the latest.

2. RESPONDENT validly accepted CLAIMANT's offer on 11 June 2006.

60 CLAIMANT's offer of 1 June 2006 has been validly accepted by RESPONDENT on 11 June 2006 *(Cl's Ex. No.4)*. Pursuant to Art. 18(1)(1) CISG "a statement made by the offeree indicating assent to an offer is an acceptance". It is thus not necessary that the offeree uses words like "acceptance". Rather, the statement of acceptance must express assent to an offer, i.e. an intention to be bound by it (*Schlechtriem/Schwenzer-Schlechtriem, Art. 18 para. 4; cf. Staudinger-Magnus, Art. 18 para. 7; Honsell-Schneyder/Straub, Art. 18 para. 20; Rudolph, Art. 18 para. 5*). Here, RESPONDENT assented to CLAIMANT's offer by acknowledging that the "price of US$ 68.00 per case for 20,000 cases of Blue Hills 2005 is […] acceptable […]" (*Cl's Ex. No. 4*). RESPONDENT validly assented to the *essentialia negotii* being price, quantity and goods, proposed by CLAIMANT.

61 RESPONDENT's intention to be bound is shown by the last sentence of its letter (*Cl's Ex. No. 4*). There, RESPONDENT expressly stated that it "would have to turn to another quality wine as the featured item […] if the contract closing were to be delayed beyond 21 June 2006" (*Cl's Ex. No. 4*). This implies that, from RESPONDENT's perspective, it had done all it considered necessary to achieve the desired result: the conclusion of a sales contract. Therefore, RESPONDENT considered its letter to be of legal significance. The fact that RESPONDENT enclosed a purchase order in its letter does not lead to a different assessment of the situation as the only relevant element is its intention to be bound. Even if RESPONDENT assumed its letter to constitute an offer and not an acceptance to conclude a purchase contract, this is irrelevant for the juridical valuation as it only reflects the understanding of a legal layman. Either way, RESPONDENT intended to give a legally binding statement. Pursuant to Art. 23 CISG "a contract is concluded at the moment when an acceptance of an offer becomes effective" in accordance with the provisions of the CISG. Art. 18 RESPONDENT's acceptance became effective when it reached CLAIMANT's place of business on 11 June 2006.

3. The Purchase Order enclosed does not affect the initial contract.

62 The Purchase Order of 10 June 2006 does not affect the closing of the initial contract. It only constitutes a clarification of the contractual terms. Para. 1 of RESPONDENT's Purchase Order

only iterates the reached agreement by citing the contracting parties, the subject of the contract as well as the quantity and price of the goods (*Cl. Ex. No. 5*). Para. 2 of the Purchase Order clarifies the conditions of delivery. In its offer of 1 June 2006, CLAIMANT stated that it would be pleased to deliver in several different shipments if RESPONDENT felt that "a single delivery of 20,000 cases would be too much at one time" (*Cl's Ex. No. 3, para. 3*). In para. 2 RESPONDENT now appoints the days when the four instalments should be due. But even if one considers para. 2 of the Purchase Order to be an offer for a "technical modification" (*Sec. Comm., Art. 27 para. 3; Bamberger/Roth-Saenger, Art. 35 para. 2*) of the contract in the sense of Art. 29(1) CISG, this does not affect the valid conclusion of the initial contract as the applicability of Art. 29(1) CISG requires an existing valid contract. The arbitration clause contained in para. 13 of the Purchase Order could not even constitute such a modification of the initial contract as it has to be distinguished from the main contract of which it forms part due to the doctrine of separability.

II. Even if the Tribunal should find that there was no conclusion of contract on 10 June 2006, the parties validly agreed on a contract of sale on 19 June 2006.

63 Even if the Tribunal should find that there was no conclusion of contract on 10 June 2006, the Parties agreed on a contract of sale on 19 June 2006. In this case RESPONDENT made a counter-offer contained in its letter dated 10 June 2006 *(Cl's Ex. No. 4, 5)* [**1.**] which had been accepted by CLAIMANT on 19 June 2006 *(Cl's Ex. No.8)* [**2.**]. RESPONDENT's offer was still effective when it was accepted by CLAIMANT on 21 June 2006 [**3.**].

1. RESPONDENT's letter dated 10 June 2006 represented a counter-offer.

64 Even if the Tribunal should find that RESPONDENT's letter and the attached one-sided signed Purchase Order dated 10 June 2006 *(Cl's Ex. No. 4, 5)* did not constitute an acceptance in accordance with Art.18(1) CISG, it nevertheless represented a counter-offer pursuant to Art.19(1) CISG [**a.**]. This counter-offer met all requirements in accordance with Art.14 CISG [**b.**] and became effective when it reached CLAIMANT on 11 June 2006 *(Cl's Ex. No.6)* [**c.**].

a. Even if the Tribunal should find that RESPONDENT's brief dated 10 June 2006 did not constitute an acceptance in accordance with Art.18(1) CISG it nevertheless represented a counter-offer pursuant to Art.19(1) CISG.

Even if the Tribunal should find that the provisions contained in RESPONDENT's Purchase Order dated 10 June 2006 constituted a modification, it has to bear in mind, that according to Art.19(1) CISG "an offer which purports to be an acceptance but contains additions […] or other modifications is a rejection of the offer and constitutes a counter-offer". Hereafter, provision No. 2 of the Purchase Order *(Cl's Ex. No.5)* constituted several modifications in regard to the terms of

delivery. RESPONDENT modified the terms to that effect, that it named the specific dates as well as the contingent of the delivery (10,000 cases by 10 August 2006; 5,000 cases by 15 September 2006; 2,500 cases between 1 and 3 October 2006; 2,500 cases upon 30 days notice. The fourth delivery is contingent upon a minimum of 12,000 cases having been sold by 25 September 2006) *(Cl's Ex. No.5)*. According to Art.19(3) CISG "additional or different terms relating, among other things,[…] place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially." As a general rule, a significant modification is given, if an acceptance contains an arbitration clause for the first time *(Filanto SPA v. Chilewich International Corp., (U.S. 1992); OLG Frankfurt (Germany 2006); Brunner, Art.19 para.3; Bianca/Bonell-Farnsworth; Art. 19 para. 2.8; Staudinger-Magnus, Art.19 para. 17; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Mankowski, Art.19 para.21; Schlechtriem/Schwenzer-Schlechtriem, Art.19 para. 8; MüKo/HGB-Ferrari, Art. 19 para. 11; Magnus, p. 87; Magnus, UN-Kaufrecht, p. 655)*. Therefore, not only the addition of the terms of delivery *((P.O. No. 2, §2; Cl's Ex. No.5)* but also the addition of the arbitration clause contained in No. 13 of the Purchase Order *(Cl's Ex. No.5)* constitute a modification since they altered the terms of CLAIMANT`s offer materially *(Midland Bright Drawn Steel v. Erlanger & Company, Inc., (U.S. 1989))*. For that reason, RESPONDENT`s letter dated 10 June 2006 constitutes a counter-offer pursuant to Art.19(1),(3) CISG.

b. RESPONDENT's counter-offer met all of the necessary requirements.

65 The counter-offer set out by RESPONDENT in its letter of 10 June 2006 met all the conditions of Art.14(1) CISG. Principally, the Articles of 14 to 17 CISG apply to the requirements of a counter-offer *(Schlechtriem/Schwenzer-Schlechtriem, Art.19 para. 11)*. As already shown above, pursuant to Art.14(1) CISG a proposal for concluding a contract, only constitutes an offer, if it is addressed to one specific person, sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Here, RESPONDENT's letter dated 10 June 2006 was addressed to CLAIMANT, a specific person. By making references to the goods (Blue Hills 2005), the quantity (20,000 cases) and its price (US$68.00 ex cellar per case) *(Purchase Order, §1; Cl`s Ex. No.5),* this counter-offer was sufficiently definite in accordance with Art.14(1)(2) CISG. Furthermore Art.19(1) CISG presumes an intention to be bound *(Schlechtriem/Schwenzer-Schlechtriem, Art.19 para. 11)*. By signing its Purchase Order RESPONDENT underlines this intention. Therefore, the counter-offer set out by RESPONDENT fulfilled all the requirements of Art.14(1) CISG.

c. RESPONDENT's counter-offer became effective when it reached CLAIMANT on 11 June 2006.

66 Pursuant to Art.15(1) CISG an offer becomes effective when it reaches the offeree. In accordance with Art.24 CISG RESPONDENT's counter-offer became effective when it reached CLAIMANT´s office on 11 June 2006.

2. CLAIMANT validly accepted RESPONDENT's counter-offer on 19 June 2006.

67 A counter-offer needs to be accepted, if a contract is to be created. The original offeror must therefore accept the counter-offer in accordance with Art. 18 CISG *(Schlechtriem/Schwenzer-Schlechtriem, Art.19 para. 12)*. In the case at hand, CLAIMANT accepted RESPONDENT's counter-offer in its letter of 19 June 2006 [**a.**]. The acceptance was within the time limit stated in the counter-offer and became effective on 21 June 2006 [**b.**].

a. CLAIMANT accepted RESPONDENT's counter-offer in its letter of 19 June 2006.

68 CLAIMANT expressly accepted RESPONDENT's counter-offer in its letter of 19 June 2006. Pursuant to Art.18(1)(1) CISG "a statement made by […] the offeree indicating assent to an offer is an acceptance". "Therefore the statement of acceptance must express assent to an offer, i.e. an intention to be bound by it" *(Schlechtriem/Schwenzer-Schlechtriem, Art.18 para. 4; Cf. Staudinger-Magnus, Art.18 para. 7; Honsell-Schneyder/Straub, Art.18 para. 20; Rudolph, Art.18 para. 5)*. In its letter of 19 June 2006 CLAIMANT stated that it would be "pleased to agree to the price [that was] quoted for 20,000 cases" of Blue Hills 2005 *(Cl's Ex. No.8)*. With this statement CLAIMANT emphasised its intention to create legal relations in regard to the sales contract. Furthermore, Art.18(1)(1) CISG indicates that an acceptance of an offer can alternatively be made by other conduct of the offeree. Principally every advanced conduct is appropriate in order to be regarded as a declaratory conduct, as long as it displays the declaration of acceptance in a sufficiently clear way *(Cf. Piltz § 3 para. 55)*. Thus, CLAIMANT`s signature and dispatch of the purchase order to RESPONDENT on 19 June 2006 also displays its intention to be bound. Therefore, CLAIMANT accepted RESPONDENT's counter-offer on 19 June 2006.

b. CLAIMANT effectively accepted the counter-offer within the time limit given by RESPONDENT.

69 CLAIMANT´s acceptance was within the time limit stated in RESPONDENT`s counter-offer and became effective on 21 June 2006. Pursuant to Art.18(2)(1) CISG an acceptance of an offer generally becomes effective "at the moment the indication of assent reaches the offeror". But, in accordance with Art.18(2)(2) CISG an acceptance only becomes effective, if the indication of assent reaches (acc. to Art.24 CISG) the offeror within the time he has fixed *(Staudinger-Magnus,*

Art. 18 para. 17; Cf. Bamberger/Roth-Saenger, Art.18 para. 3; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Mankowski, Art.18 para. 22). In the case at hand, RESPONDENT stated in its letter of 10 June 2006 that the contract closing cannot be delayed beyond 21 June 2006 *(Cl's Ex. No.4)*. Thus an acceptance was possible up to and including 21 June 2006. According to the ABC tracking service on the internet, CLAIMANT's acceptance was received by RESPONDENT on 21 June 2006 *(St. of Cl., §9)*. Therefore CLAIMANT validly accepted RESPONDENT's counter-offer within the fixed period of time. Thus its acceptance became effective on 21 June 2006.

3. RESPONDENT's counter-offer was still effective when it was accepted by CLAIMANT on 21 June 2006.

70 RESPONDENT's offer of 10 June 2006 was not limited by a valid withdrawal in accordance with Art.15(2) CISG [**a.**]. Also, there was no valid revocation by RESPONDENT pursuant to Art.16 CISG [**b.**] and no rejection by CLAIMANT prior to Art.17 CISG [**c.**].

a. RESPONDENT's counter-offer of 10 June 2006 was not terminated by a valid withdrawal.

71 RESPONDENT's counter-offer of 10 June 2006 was not terminated by a valid withdrawal in accordance with Art.15(2) CISG. Art.15(2) CISG states that "an offer […] may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer". An offer reaches the addressee, in accordance with Art.24 CISG, when it enters his sphere of influence and the addressee is able to take note of it *(Schlechtriem/Schwenzer-Schlechtriem, Art.24 para. 13; Herber/Czerwenka, Art.24 para. 2; Staudinger-Magnus, Art.24 para. 15; Brunner, Art.24 para. 2; Karollus, pp. 58,59; Neumayer, p. 104)*. Whereas "the addressees awareness of the declaration is irrelevant". *(Schlechtriem/Schwenzer-Schlechtriem, Art.24, para. 12; Staudinger-Magnus, Art.24, para. 15; Bianca/Bonell-Farnsworth; Art.24 para. 2.4; MüKo/HGB-Ferrari, Art.24 para. 8)* RESPONDENT's counter-offer of 10 June 2006 was received by CLAIMANT on 10 June 2006 *(Statement of Claim, §8)*. Whether Mr. Cox was currently absent from his office is insignificant, since the actual attention is not necessary for the reach of an offer. Therefore RESPONDENT's offer reached CLAIMANT on 10 June 2006. Since an offer may be withdrawn by the offeror only "before or at the same time as it reaches the offerree" *(Schlechtriem/Schwenzer-Schlechtriem, Art.15 para. 4; Bamberger/Roth-Saenger, Art.15 para. 3)* RESPONDENT was not able to withdraw its offer of 10 June 2006 on 18 June 2006. Pursuant to Art.15(2) CISG the take-back deadline ended on 10 June 2006, as that was the day that the offer reached CLAIMANT. Thus there had been no valid withdrawal of RESPONDENT's counter-offer of 10 June 2006.

b. RESPONDENT was not able to revoke its counter-offer of 10 June 2006.

72 Furthermore RESPONDENT was not able to revoke its counter-offer of 10 June 2006. Since RESPONDENT stated a fixed time for acceptance its offer became irrevocable according to Art.16(2)(a) CISG [**i.**]. Even if the Tribunal should find that RESPONDENT did not set a fixed time for acceptance it was reasonable for CLAIMANT to rely on the offer as being irrevocable [**ii.**]. Finally, CLAIMANT's acceptance had already been dispatched before RESPONDENT's revocation reached CLAIMANT on 19 June 2006 [**iii.**].

i. RESPONDENT was unable to revoke its counter-offer as it indicated a fixed time for acceptance.

73 According to Art.16(2)(a) CISG RESPONDENT could not revoke its counter-offer as it indicated a fixed time for acceptance. Art.16(2)(a) CISG states that an offer cannot be revoked if it indicates, by stating a fixed time, that it is irrevocable. In its letter of 10 June 2006 RESPONDENT stated that it "would have to turn to another quality wine as the featured item […] if the contract closing were to be delayed beyond 21 June 2006" *(Cl's Ex. No.4)*. As already shown above, interpretation has to be made in accordance with Art.8 CISG. Pursuant to Art.8(1) CISG "statements made by […] a party are to be interpreted according to his intent where the other party knew […] what that intent was". With regard to the daily trade business it would be unreasonable to set such a period of time without intending not to be bound beyond that respective date. Furthermore it is reasonable that every sentence and especially a fixed period for acceptance is of significance. This explanation is supported by RESPONDENT's statement that it is "now under rather intense time pressure" *(Cl's Ex. No.4)*. Consequently RESPONDENT wanted to clarify, that it did not intend to be bound beyond 21 June 2006.

74 Pursuant to the legal sense of Art.16(2)(a) CISG an offer becomes automatically irrevocable in case a fixed time for acceptance was set. Even if RESPONDENT takes for granted that Art.16(2)(a) CISG only states a rebuttal presumption of the offeror's intention to state an irrevocable offer *(Schlechtriem/Schwenzer-Schlechtriem, Art.16, para. 9)* this assumption cannot establish a valid revocation of RESPONDENT's offer of 10 June 2006. If Art.16(2)(a) CISG states no more than a rebuttable presumption, such presumption must be reversed. The burden of evidence for such reversion is upon the offeror *()*. As mentioned above the Tribunal has to keep in mind that every intend of a party in accordance with Art.16(2)(a) CISG needs to be regarded under the requirements of Art.8 CISG. Thus from a point of view of a reasonable person RESPONDENT visibly stated the intent not to be bound on its offer beyond 21 June 2006. Thus, the offer became irrevocable pursuant to Art.16(2)(a) CISG.

ii. It was reasonable for CLAIMANT to rely on the offer as being irrevocable.

75 Even if the Tribunal should find that RESPONDENT did not set a fixed time for acceptance it was reasonable for CLAIMANT to rely on the offer as being irrevocable. Art.16(2)(b) CISG makes provisions that if a party can rely on the offer as being irrevocable and acts in reliance on the offer, the offer cannot be revoked by the other party. However, interpretation under Art.8 CISG emphasizes that for the purpose of this Convention statements made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. In the case under consideration a reasonable person would perceive that CLAIMANT was capable to rely on the offer as being irrevocable. This perception is reinforced by the fact that RESPONDENT stated on 10 June 2006 that the conclusion of contract "must move quickly" *(Cl's Ex. No.4)*. Enclosed RESPONDENT confirmed its intention to move forward to the conclusion of the sales contract. For that reason CLAIMANT was permitted to sign the purchase order in reliance on the validity of RESPONDENT's offer according to Art.16(2)(a) CISG.

iii. CLAIMANT´s acceptance was dispatched before RESPONDENT tried to revoke its counter-offer.

76 Furthermore, CLAIMANT's acceptance had already been dispatched before RESPONDENT even tried to revoke its counter-offer on 19 June 2006. Therefore the contract could not have been validly revoked. Art.16(1) CISG states that "until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance". In the morning of 19 June 2006, CLAIMANT dispatched its acceptance to RESPONDENT`s offer *(St. of Cl., §9)*. But, due to a network failure, RESPONDENT´s (revocation) e-mail dated 18 June 2006 did not reach CLAIMANT until the afternoon of 19 June 2006 *(St. of Cl., §10)*. According to Art.24 CISG "an indication of intention "reaches" the addressee when it is delivered to […] his mailing address". Thus "an electronic message 'reaches' an addressee, if it has entered 'his' server in such way, that it can be retrieved, read, and understood by the addressee. The addressee, in other words, must be capable of taking notice of its content" *(Schlechtriem/Schwenzer-Schlechtriem, Art.24 para. 3; Staudinger-Magnus, Art. 24 para. 16; MüKo/BGB-Gruber, Art. 24 para. 13)*.

77 In this case, the problem was due to a software failure. "The server was (indeed) able to receive messages from the outside, but could not communicate with the various computers in the internal network at Wine Cooperative" *(P.O. No. 2, §26)*. Therefore, the e-mail entered the main server, but could not be allocated to the righteous addressee. Hence, even if the e-mail, as alleged by RESPONDENT *(St.of Def., §6)*, did enter CLAIMANT`s server on 18 June 2006, CLAIMANT was unable to take notice of the content of this e-mail. CLAIMANT was not able to read and

retrieve the e-mail until in the afternoon of 19 June 2006 *(Cf. MüKo/BGB-Gruber, Art. 24 para. 14; Schlechtriem/Schwenzer-Schlechtriem, Art. 24 para. 3)*. Thus the e-mail did not reach CLAIMANT on 18 June 2006, but in the afternoon of 19 June 2006, and therefore after already dispatching the acceptance.

78 However, RESPONDENT might allege, that Art.15(2) UNCITRAL EC is applicable to its revocation of 18 June 2006. Pursuant to Art.15(2)(a)(i) UNCITRAL EC it applies that, "if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs at the time when the data message enters the designated information system". Thereafter the e-mail sent by RESPONDENT would have been received on 18 June 2006. But, as already shown above, the UNCITRAL EC is only to be regarded to as an addendum to the CISG, which does not intend to overrule national provisions, such as the CISG. Since Art.15(2)(a)(i) UNCITRAL EC runs counter to the legal provision of Art.24 CISG, the UNCITRAL EC is not applicable. As a result, RESPONDENT`s e-mail did not reach CLAIMANT until after CLAIMANT already dispatched its acceptance.

c. CLAIMANT did not reject RESPONDENT's offer of 10 June 2006.

79 CLAIMANT did not reject RESPONDENT's offer of 10 June 2006. Pursuant to Art.17 CISG an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror. There had been no statement of rejection. CLAIMANT rather accepted RESPONDENT's offer on 19 June 2006 by signing the purchase order *(Cl's Ex. No.8)*. Since RESPONDENT did not as mentioned above validly withdraw, revoke or reject its counter-offer of 10 June 2006 it was still effective when it was accepted by CLAIMANT on 21 June 2006.

FIFTH ISSUE: BLUE HILLS 2005 IS FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO CLAIMANT AT THE TIME OF THE CONCLUSION OF THE CONTRACT.

80 The particular purpose made known to CLAIMANT in accordance with Art. 35(2)(b) CISG was "to feature Blue Hills 2005 as quality wine in RESPONDENT's wine promotion" [**A.**]. Blue Hills 2005 is fit for the conditions of this purpose as they are established by the understanding of a reasonable person [**B.**].

A. The particular purpose made known to CLAIMANT was to feature Blue Hills 2005 as quality wine in RESPONDENT's wine promotion.

81 The establishment of the particular purpose is made in accordance with Art. 35(2)(b) CISG and therefore only statements prior to the conclusion of the contract are relevant [**I.**]. Applying this standard, the particular purpose made known to CLAIMANT is to feature Blue Hills 2005 as a

quality wine in RESPONDENT's wine promotion [**II.**].

I. The particular purpose has to be "made known" in accordance with Art. 35(2)(b) CISG.

82 The question whether a particular purpose has been made known, is answered in Art. 35(2)(b) CISG. Pursuant to this provision the seller has to deliver goods "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract". The seller must have had reason to recognise the particular purpose [**1.**]. Art. 35(2)(b) CISG applies a time frame relevant for the particular purpose to be made known [**2.**].

1. A particular purpose is considered to have been "made known" if a reasonable seller could have recognised it.

83 The particular purpose must have been made known to the seller either expressly or impliedly. "There are no problems if the particular purpose is expressly made known to the seller" *(Schlechtriem/Schwenzer-Schwenzer, Art. 35 para. 21)*. In that case the seller has to raise an objection if he wishes to avoid liability. "However, it is sufficient for the particular purpose to have been made known to him implicitly" *(Schlechtriem/Schwenzer-Schwenzer, Art. 35, para. 21; cf. LG München, (Germany 2002))*. The wording of Art. 35(2)(b) – which focuses on the act of "making known" the purpose to the seller – also indicates that it must be sufficient if a reasonable seller could have recognized the particular purpose from the circumstances *(Schlechtriem/Schwenzer-Schwenzer, Art. 35 para. 21; Staudinger-Magnus, Art. 35 para. 28; Achilles, Art. 35 para. 7; Karollus, p. 117)*. Therefore CLAIMANT has to consider only that information that was made known. In the case at hand information from the Durhan wine fair and statements made in the correspondence between the Parties.

2. The relevant time frame for a particular purpose to be made known is until the dispatch of acceptance.

84 According to Art. 35(2)(b) CISG the particular purpose must be made known to the seller "at the time of the conclusion of the contract". Subsequent notification is insufficient *(Schlechtriem/Schwenzer-Schwenzer, Art. 35 para. 22; cf. Staudinger-Magnus, Art. 35 para. 30; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Ferrari, Art .35 para. 18; Heilmann, p. 180; Aue, pp. 75, 76; Hutter, p. 44)*. The wording of Art. 35(2)(b) CISG focuses on the time of the conclusion of the contract. This would mean that conduct expressed to the seller after the dispatch of the acceptance could also lead to the seller's liability for a particular purpose. The buyer could include further conditions with the seller having no chance to react. Therefore, the seller would not be able to decide on bearing the risk of the actual practicability for the particular

purpose anymore. These consequences definitely overstretch the intention of Art. 35(2)(b) CISG. Its intention is rather to give a legal meaning to simple conduct of the buyer, by making this conduct part of the contract as particular purpose similar to conduct that would be attributed to Art. 35(1) CISG. Whether conduct and its legal meaning have to be considered at all needs to be determined consistently in the CISG. A similar valuation of conduct can inherently be found in Art. 16(2)(b) CISG, which is used as a source of principles for gap-filling for other provisions of the CISG (Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para.1). According to this provision conduct that has to be considered is already restricted to the point of the dispatch of acceptance. As a consequence, for the same reasons that have been mentioned before [fourth Issue] a restriction for conduct under Art. 35(2)(b) CISG is justified. Hence, conduct is legally relevant only until the dispatch of the acceptance. Giving a legal meaning as intended by Art. 35(2)(b) CISG grants the same legal effect to the conduct but also exposed it to the same restrictions as are applied to conduct that has per se a legal meaning. It cannot have the effect of elevating the conduct even further and therewith give it more impact or consequences than conduct allocated to Art. 35(1) CISG.

85 Therefore, only statements and conduct of RESPONDENT before the dispatch of CLAIMANT's acceptance are to be considered as relevant for determination of the particular purpose. In the case at hand the relevant time frame for "making known" the particular purpose is from the Durhan Wine fair in May 2006, where RESPONDENT's principal wine buyer Mr. Wolf showed first interest in Blue Hills 2005, until CLAIMANT dispatched his acceptance in the morning of 19 June 2006.

II. The particular purpose expressly or impliedly made known by RESPONDENT to CLAIMANT is established by RESPONDENT's statements.

86 Since RESPONDENT's purchase order did not expressly state any particular purpose that Blue Hills 2005 had to be fit for *(Cl's Ex. No. 5)*, the particular purpose is to be derived from the statements made by RESPONDENT during correspondence with CLAIMANT. Solely these statements can be subject to the determination of whether a particular purpose has been made known or not. Applying every conduct would lead to an infinite and immeasurable amount of potential contract parts. Thus RESPONDENT made known to CLAIMANT that it wanted to feature Blue Hills 2005 in its wine promotion [**1.**]. Furthermore it made known that Blue Hills 2005 has to be a quality wine [**2.**]. And finally, CLAIMANT will demonstrate that RESPONDENT never made known that Blue Hills 2005 had to be a lead wine [**3.**].

1. RESPONDENT made known that Blue Hills 2005 was to be featured in the wine promotion.

87 RESPONDENT did make known to CLAIMANT that Blue Hills 2005 was supposed to be featured in its September wine promotion. In its letter of 10 June 2006 RESPONDENT stated, that it was "interested in featuring Blue Hills 2005 in [its] wine promotion" *(Cl`s Ex. No. 2)*. It reiterated this purpose in its e-Mail of 18 June 2006, where RESPONDENT alleges, that to "feature Blue Hills 2005 in [its] wine promotion would have created […] a commercial catastrophe" *(Cl`s Ex. No. 9)*. Therefore RESPONDENT expressly made known to CLAIMANT that it wanted to "feature" Blue Hills 2005 in its promotion.

2. RESPONDENT made known that Blue Hills 2005 has to be a quality wine.

88 Furthermore RESPONDENT made known that Blue Hills 2005 has to be a quality wine. In its letter of 21 June 2006 RESPONDENT stated that if the contract closing between the parties were to be delayed beyond 21 June 2006 it "would have to turn to **another quality wine** as the featured item [Blue Hills 2005]" *(emphasis added) (Cl`s Ex. No. 4)*. Therefore, by inversing this statement, RESPONDENT made known that in order to be the featured item in the wine promotion, Blue Hills 2005 has to be a quality wine.

3. The expression "lead" wine was not made known as part of the particular purpose.

89 The term "lead" wine was not made known to CLAIMANT as a part of the particular purpose but much more as a mere ascertainment. A particular purpose has to be either expressly or impliedly made known to the seller at the time of the conclusion of the contract *(Schlechtriem/Schwenzer-Schwenzer, Art. 35 para. 21; Staudinger-Magnus, Art.35 para. 27; Huber/Mullis, p. 139)*. It requires the seller to be informed in a "crystal clear and recognisable way" *(LG Darmstadt, (Germany 2000); LG München, (Germany 2002))*. But in the case at hand, RESPONDENT neither expressly nor impliedly made known that "[taking the] lead" was supposed to be a part of the particular purpose. Since the term "lead" is an unsubstantial word, it was not meant to compose a particular purpose but to be a declarative statement revealing RESPONDENT`s opinion towards Blue Hills 2005. This opinion is that Blue Hills 2005 definitely has "the right character to take the lead in the promotion" *(Cl's Ex. No. 2)*.

90 Emphasizing this argument is the fact, that RESPONDENT`s decision to take Blue Hills 2005 as the lead wine of the promotion was of subjective character, which CLAIMANT had no bearing onto. However, the seller has to be given the opportunity to decide whether he wants to bear the risk of a particular purpose or not *(Staudinger-Magnus, Art. 35, para. 30; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Ferrari, Art. 35 CISG, para. 18; Huber/Mullis, p. 138).* Therefore the buyers expectations to the suitability of the goods have to be

conveyed in a way, that the information advantage of the seller concerning its goods is so distinctive *(Staudinger-Magnus, Art. 35, para. 26)* that he can refuse to enter the contract if he does not want to bear the risk *(Sec.Comm., Art. 35, para. 8; Schlechtriem/Schwenzer-Schwenzer, Art. 35, para. 21; Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Ferrari, Art. 35 CISG, para. 18; Staudinger-Magnus, Art. 35, para. 30; Lüderitz, p. 186).*

91 The necessary acknowledgement requires that the facts disclose the particular purpose in an adequate way *(Achilles, Art. 35 para. 8)*. By stating that Blue Hills 2005 has "just the right character to take the lead in the promotion" *(Cl's Ex. No.2)*, RESPONDENT did not disclose any particular characteristics that Blue Hills 2005 should be composed of in order to be suitable to take the "lead". Much more, it was uncertain for CLAIMANT, among which wines Blue Hills 2005 was supposed to take the lead. CLAIMANT never understood from the circumstances, that Blue Hills 2005 was supposed to take the lead of a promotion that would, e.g., feature Blue Hills 2005 and a wine of best quality, such as a Bordeaux Grand Cru. As a result of this "not knowing", CLAIMANT never had the chance to confirm RESPONDENT, if its wine actually had the quality to compete among other wines as the "lead" wine.

92 CLAIMANT was not given the opportunity to decide if it wanted to take over the risk of fulfilling the necessary requirements in order to meet the particular purpose or not. Furthermore CLAIMANT had no opportunity to reject RESPONDENT`s statements.

93 As a result, having the "right character to take the lead in the promotion" and any further coherences have not been made known as a part of a particular purpose but much more as an ascertainment. Consequently and regardless of any of RESPONDENT`s allegations the particular purpose made known to CLAIMANT was to feature Blue Hills 2005 as quality wine in RESPONDENT's wine promotion.

B. Blue Hills 2005 is fit for the particular purpose made known to CLAIMANT.

94 The particular purpose for Blue Hills 2005, which is to be featured as a quality wine in RESPONDENT's wine promotion, is ambiguous. Therefore the particular purpose needs to be clarified by the understanding of a reasonable person in CLAIMANT's position [**I.**]. In accordance with this understanding of the particular purpose Blue Hills is a quality wine [**II.**]. Despite the newspaper articles in Equatoriana Blue Hills 2005 can be featured in RESPONDENT's wine promotion [**III.**]. By all means Blue Hills 2005 is required to be and in fact is saleable [**IV.**].

I. RESPONDENT's ambiguous statements have to be determined in accordance with the understanding of a reasonable person.

95 The particular purpose made known to CLAIMANT as shown above is to use Blue Hills 2005 "as

a quality wine featured in RESPONDENT's wine promotion". In order to prove Blue Hills's fitness for this purpose, the conditions it applies have to be determined. Although RESPONDENT made known a particular purpose, this purpose consists of elements, which leave a wide scope to interpretation. The terms used by RESPONDENT in its statements in order to communicate a particular purpose can be understood in different ways and are therefore ambiguous. The provision for any interpretation under the CISG are provided in Art. 8 CISG. As CLAIMANT could not have been aware of RESPONDENT's intent, Art. 8(1) CISG is not applicable. "If [Art. 8(1)] is not applicable" Art. 8(2) CISG provides the standard for interpretation. According to Art. 8(2) CISG "statements [...] and other conduct [...] are to be interpreted according to the understanding of a reasonable person of the same kind in the same circumstances" *(See also: Honnold, Art. 8, para. 107.1; Karollus, p. 47; Bianca/Bonell, Art. 8, para. 2.1; Brunner, Art. 8, para. 3)*. Hence, the statements made by RESPONDENT have to be interpreted according to a reasonable person in the same position.

II. Blue Hills 2005 is a quality wine.

96 Blue Hills 2005 is required to be and certainly is a quality wine. This conclusion is to be drawn of RESPONDENT´s statement of 10 June 2006. Here RESPONDENT stated, that if the contract closing between the Parties were to be delayed beyond 21 June 2006 it "would have to turn to **another quality wine** as the featured item [Blue Hills 2005]" *(emphasis added) (Cl`s Ex. No. 4)*. As already shown above, a legal interpretation can be made in accordance with Art. 8 CISG. RESPONDENT´s statement understood from the perspective of a reasonable business person in the same position as CLAIMANT could only mean that Blue Hills 2005 is a quality wine. RESPONDENT stated that it would have "to turn to **another** quality wine as the **featured** item" *(emphasis added) (Cl`s Ex. No. 4)*. It hence implied an acknowledgement that Blue Hills 2005 is a quality wine.

97 For the purpose of finding out, what quality Blue Hills 2005 has to consist of in order to be referred to as a quality wine, the ambiguous and relative term of "quality" needs to be interpreted [**1.**]. Furthermore CLAIMANT will demonstrate that the concentration of diethylene glycol contained in Blue Hills 2005 does not impair this quality [**2.**].

1. The term "quality wine" is a relative term subject to interpretation.

98 Due to the fact that the "quality" of a wine is a relative notion, this expression calls for further interpretation. The quality of a wine can be determined by its category, the location of its vineyards, the quality of the grapes, its ingredients, its flavour and its market price. The Blue Hills area is known for its high quality wines. Furthermore, Blue Hills 2005 "is a blended wine of several different grape varieties grown in the Blue Hills region" *(St. of Cl. §5)*. In its price

category, Blue Hills 2005 is regarded to be an "outstandingly fine wine, as was acknowledged by the jury" *(Cl's Ex. No.1)*. Even RESPONDENT voluntarily admitted that Blue Hills 2005 is an excellent wine, as at the wine fair it found "many excellent wines in offer", but Blue Hills 2005 to be "among the best in their price bracket" *(Cl's Ex. No.2)*.

99 Furthermore, the fact that Blue Hills 2005 has already won several prizes *(Cl's Ex. No.1)* shows that it stands out from the other wines of its category not only from a subjective view but also from an experts perspective.

2. The concentration of diethylene glycol does not affect Blue Hills's quality.

100 The concentration of diethylene glycol contained in Blue Hills 2005 does not alter the quality. In order to prove this, Prof. Sven Ericson, who is "head of the Wine Research Institute at the Mediterraneo State University and […] a world renowned leader in research into improving wine production" *(Cl's Ex. No.10)*, examined Blue Hills 2005 and its ingredients. Concerning its ingredients, the report by Prof. Ericson shows that the concentration of diethylene glycol contained in Blue Hills 2005 is not harmful to the human body, but a rather normal use as a sweetening agent.

101 Diethylene glycol only has a toxic impact, when used in excessive amounts *(Cl's Ex. No.13)*. However, the amount used in the production of Blue Hills 2005 equals up to 0.002 grams per bottle per kg body weight for a 70 kg individual. Ericson certifies, that it therefore would be "necessary to consume an extraordinary amount of Blue Hills 2005 before there would be any health concerns from the diethylene glycol." In other words, "the alcohol in the wine would induce toxic effect prior to those resulting from the diethylene glycol" *(Cl's Ex. No.13)*. To put this into numbers, an average single person of 70 kg would have to drink 143 l of the wine in order for any health concerns to occur. This equals up to 190 bottles, which would have to be drunk in one day, since the human body egests the diethylene glycol expeditiously. There are no more traces of diethylene glycol in the body within 16 hours (*www.bgchemie.de/webcom/wcsearch.php?wc_search=diethylenglykol).* Hence the customer is left without harm or risk thereof even on long-term basis.

102 This report, as well as the fact that there have never been any reports on health problems associated with drinking Blue Hills 2005 *(P.O. No. 2, §14)*, shows that the diethylene glycol contained in Blue Hills 2005 is not harmful to the human body at all. This is also acknowledged by RESPONDENT in its letter of 25 July 2006 *(Cl's Ex. No.14).*

103 Beyond the fact, that the concentration of diethylene glycol contained in Blue Hills 2005 is not unhealthy at all, it does not impair the great taste of the wine as to the effect, that the consumer would be able to determine it by tasting the wine *(P.O. No. 2, §13)*. It much more supports Blue

Hills 2005 excellent mawkishly taste, for which this wine is renowned. Hence, the quality of Blue Hills 2005 is not affected by the addition of diethylene glycol.

III. The newspaper articles in Equatoriana do not affect Blue Hills 2005 fitness to be featured in RESPONDENT's wine promotion.

104 The press in Equatoriana does not affect Blue Hills's fitness for the particular purpose, which is to feature Blue Hills 2005 in RESPONDENT's wine promotion. RESPONDENT cannot argue that the reputation of Blue Hills 2005 matters in regard of whether or not it is fit for the particular purpose. However, this is not the case. This is merely RESPONDENT attempting to avoid his own sales risk. In will be shown that, according to RESPONDENT, the particular purpose for Blue Hills 2005 was a promotion campaign in order to increase its popularity [**1.**]. Assuming but not conceding that Blue Hills's reputation is relevant for its fitness for the particular purpose, it will be shown that despite the newspaper articles in Equatoriana, Blue Hills 2005 can still be featured in RESPONDENT's wine promotion [**2.**].

1. Interpreting RESPONDENT's statements, Blue Hills 2005 was supposed to be featured in its promotion campaign in order to increase the wine's popularity.

105 Blue Hills 2005 fits the particular purpose which was "to be featured in the wine promotion". The term "to be featured in the wine promotion" neither implies with certainty how Blue Hills 2005 is supposed to be used, nor does it imply what conditions are required to be fit for such a purpose. As a result of this ambiguity again the term has to be determined in accordance with the understanding of a reasonable person in CLAIMANT's position in accordance with Art. 8(2) CISG. Featuring Blue Hills 2005 in a wine promotion was for the purpose of increasing its popularity in Equatoriana. RESPONDENT was therefore looking for a wine which depends on and is fit for promotion. Blue Hills 2005 was supposed to be introduced to the market in Equatoriana in RESPONDENT's major wine promotion *(St. of Cl. §5)*. It was supposed to be the commercial launch of a new product featured by RESPONDENT.

106 If RESPONDENT wanted to use the popularity of a wine in order to promote other wines he would not have chosen Blue Hills 2005 since this wine is not known in Equatoriana and does not provide the required popularity. RESPONDENT's wine buying team looked especially for wines not previously marketed in Equatoriana *(St. of Cl. §5)*. RESPONDENT wanted in fact a product not known in his country. The quality of Blue Hills 2005 did in fact convince RESPONDENT's wine buying team as well, which shows in RESPONDENT's letter dated 22 May 2006: "It has just the right character to take the lead in the promotion"*(Cl's Ex. No. 2)*. CLAIMANT could only understand that RESPONDENT's intent was to promote Blue Hills 2005 in order to increase the wine's popularity.

2. The fitness of Blue Hills 2005 to be featured in RESPONDENT's wine promotion is not affected by the newspaper articles in Equatoriana.

107 Newspaper articles published in Equatoriana do not affect the fitness of Blue Hills 2005 for its particular purpose. Blue Hills' reputation in Equatoriana does not affect its ability to be featured in a promotion campaign.

108 RESPONDENT expressly chose to feature a wine, unknown in Equatoriana. Blue Hills 2005 had not been marketed in Equatoriana before *(St. of Cl. §5)*. Therefore, RESPONDENT preferred to take care of the marketing of Blue Hills 2005 himself. Marketing a new product when introducing it to the market includes advertising. It always entails a commercial risk to sell a product new to the market. RESPONDENT, as one of the largest wine retailers in Equatoriana *(St. of Cl. §4)*, would have been the launch customer of Blue Hills 2005 *(Cl's Ex. No. 8)* and therefore knew of this challenge. Therefore, RESPONDENT intended, with the wine promotion, to reduce its commercial risk. RESPONDENT alleges that "following the newspaper articles that appeared in the newspapers in Equatoriana [...] Blue Hills 2005 was not fit for the particular purpose [...] which was to feature Blue Hills 2005 in the wine promotion [...]"*(St. of Def. §19)* and that featuring Blue Hills would have "[...] created for us a commercial catastrophe [...]" *(Cl's Ex. No. 9)*. However, Blue Hills is still promotable. The newspaper articles in Equatoriana may indeed complicate the marketing of Blue Hills 2005, but the fact that a product receives bad publicity neither precludes that it is being marketed nor does it eliminate its chances of being sold. The task of establishing outstanding sales figures might therefore have become more difficult. But these are the tasks of business companies to deal with sales risks.

109 The articles affect only the marketing process and not Blue Hills 2005 fitness to be subject of marketing. The sale of Blue Hills 2005 is a matter of promotion. That is exactly what RESPONDENT communicated to CLAIMANT. Blue Hills's reputation is therefore RESPONDENT's challenge. The particular purpose made known does not include a warranty on actual saleability. Therefore, what the press in Equatoriana reports is of no relevance. Despite the accusations in the press RESPONDENT is still in the position to promote and sell Blue Hills 2005. Neither CLAIMANT nor any other reasonable person could have been aware of RESPONDENT 's alleged intent to contract with a warranty for being able to sell Blue Hills 2005 with a high profit. CLAIMANT is responsible for the legal saleability but not for the sales risk in general. The particular purpose of being featured in a wine promotion is not affected by the press in Equatoriana.

IV. Blue Hills 2005 is saleable in Equatoriana and is in accordance with the particular purpose.

110 In order to fulfil the particular purpose, namely "to feature Blue Hills 2005 as a quality wine in RESPONDENT's wine promotion", Blue Hills is required to have unrestricted saleability. CLAIMANT is responsible for the legal aspects of Blue Hills's saleability. Blue Hills's saleability is constricted neither by the law of Mediterraneo nor by the law of Equatoriana [**1.**]. Although CLAIMANT is not responsible for the commercial sales risk and the actual saleability, it is possible to prove that Blue Hills 2005 can still be sold [**2.**].

1. The saleability of Blue Hills 2005 is not constricted by law.

111 Blue Hills 2005 is perfectly saleable regarding the law of both Mediterraneo and Equatoriana. The usage of diethylene glycol in the wine production does not violate the law of these countries. Neither Mediterraneo nor Equatoriana constituted any specific provisions concerning the use of diethylene glycol in wine *(P.O. No. 2, §11)*. Therefore adding diethylene glycol to wine does not constitute a violation of the law of either country. But both countries did enforce provisions as to the amount of diethylene glycol that can be present in consumables in general (*P.O. No. 2, §11)*. However, the amount of 0.15 g of diethylene glycol contained in Blue Hills 2005 is less than the permitted amount in both countries. It was therefore admissible for CLAIMANT to use diethylene glycol in the production of Blue Hills 2005. Thus, in regard of the legal aspects of Blue Hills 2005, CLAIMANT could deliver a wine in conformity with the contract.

2. Blue Hills 2005 can in fact be sold successfully.

112 Blue Hills 2005 can be successfully sold by RESPONDENT. RESPONDENT alleges in its email of 18 June 2006 that Blue Hills 2005 could not be sold and featuring Blue Hills 2005 "[...] would have created a commercial catastrophe [...]. This statement shows that RESPONDENT fears "a commercial catastrophe", due to Blue Hills's fitness. However, it has been proven that Blue Hills 2005 is fit for the particular purpose, namely being the featured item in a wine promotion. Therefore, CLAIMANT's product "Blue Hills 2005" provides all requirements necessary for a commercial success. CLAIMANT has fulfilled all obligations that could possibly influence the commercial development of the sale of Blue Hills 2005. RESPONDENT's accusation cannot be proven. However, CLAIMANT can in fact prove that the assumed sales risk by RESPONDENT does not exist.

113 Since there is not yet an attest to the impact of the articles, the proof has to be made with the aid of the happenings in Mediterraneo, where the newspaper articles first appeared. As CLAIMANT`s sales numbers of Blue Hills 2005 demonstrate, they did not have any impact on the customers' appreciation. The retail of the Blue Hills 2005 might have been imperceptibly slower, than

otherwise expected, "but there was not a radical drop in sales" *(P.O. No. 2, §21)*. "A total of 87,000 cases of Blue Hills 2005 have been produced" *(P.O. No. 2, §20)* and only 3,000 cases in addition to the 20,000 cases that belong to Super Markets have not been sold yet *(St. of Cl. §14)*. Therefore a total amount of 64,000 cases were sold. Excluding the 20,000 cases that belong to Super Markets, more than 95 % of the produced wine was sold. This shows, that the saleability of Blue Hills 2005 is not constricted at all and that RESPONDENT can expect a commercial success.

REQUEST FOR RELIEF

In view of the above submissions, may it please the Tribunal to declare that:

- The Parties concluded a valid arbitration agreement on 19 June 2006 **[First Issue]**.
- The Arbitral Tribunal must not grant a stay of the arbitral proceedings **[Second Issue]**.
- There are several appropriate consequences the Arbitral Tribunal should consider following RESPONDENT's violation of Art. 17(3) JAMS Rules **[Third Issue]**.
- A contract concerning the sale of Blue Hills 2005 was concluded between CLAIMANT and RESPONDENT **[Fourth Issue]**.
- Blue Hills 2005 is fit for the particular purpose made known to Claimant **[Fifth Issue]**.

For Mediterraneo Wine Cooperative

(signed) _____, 6 December 2007

ATTORNEYS

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