FIFTEENTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2007 – 2008

MEMORANDUM

FOR

EQUATORIANA SUPER MARKETS S.A.

- RESPONDENT -

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

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

AGAINST

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

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

§	Section
Am. Rev. Int´l Arb.	American Review of International Arbitration
Art.	Article
Artt.	Articles
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BT-Drs.	Bundestag Drucksache
c.f.	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
Cl's Memo.	Memorandum for Claimant
CLOUT	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
CMR	Übereinkommen über den Beförderungsvertrag in internationalen Straßengüterverkehr
Comm. Ct.	Commercial Court of Vindobona, Danubia
DAL	Danubian Arbitration Law
e.g.	exemplum gratia (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (German Private International Law)
et seq.	et sequentes (and following)
F.3d	Federal Reporter, Third Series
FactÜ	UNIDROIT Übereinkommen über Internationales Factoring
i.e.	id est (that means)
infra	below
JAMS	Judicial Arbitration and Mediation Services
JAMS RULES	JAMS International Arbitration Rules

KTS	Konkurs; Treuhand- und Schiedsgerichtswesen
LG	Landgericht (Regional Court, Germany)
MAL	Model Law of the United Nations Commission on International Trade on International Commercial Arbitration
NJW	Neue Juristische Wochenschrift
No.	Number
Nos.	Numbers
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OLG	Oberlandesgericht (Court of Appeals, Germany)
p.	Page
P.O.	Procedural Order
para.	Paragraph
paras.	Paragraphs
pp.	Pages
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German Law Journal)
s.	Sentence
S.A.	Société Anonyme, Sociedad Anónima
St. of Claim	Statement of Claim
St. of Def.	Statement of Defense
supra	above
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade
UNCITRAL EC	UNCITRAL Model Law on Electronic Commerce
UNIDROIT	International Institute for the Unification of Private Law
v.	versus (against)
Vol.	Volume
WM	Zeitschrift für Wirtschafts- und Bankrecht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

TABLE OF AUTHORITIES

BAMBERG, HEINZ GEORG ROTH, HERBERT	Kommentar zum Bürgerlichen Gesetzbuch Band 3, Munich, 2003 CITED IN: para. 90 (CITED AS: *Bamberger/Roth-author*)
BERGER, KLAUS PETER	International Economic Arbitration Deventer, 1993 CITED IN: paras. 39, 41 (CITED AS: *Berger*)
BÖCKSTIEGEL, KARL-HEINZ KRÖLL, STEFAN MICHAEL NACIMIENTO, PATRICIA	Arbitration in Germany The Model Law in Practice The Netherlands, 2007 CITED IN: para. 24, 32, 33 (CITED AS: *Böckstiegel/Kröll/Nacimientö-author*)
BIANCA, CESARE MASSIMO BONELL, MICHAEL JOACHIM	Commentary on the International Sales Law The 1980 Vienna Sales Convention Milan, 1987 CITED IN: paras. 61, 65, 66, 68, 77 (CITED AS: *Bianca/Bonell-author*)
BROWN, HENRY J. MARRIOTT, ARTUHR L.	ADR Principles and Practice 2nd edition, London, 2005 CITED IN: para. 1 (CITED AS: *Brown/Marriott*)

BRUNNER, CHRISTOPH
UN-Kaufrecht – CISG
Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internaionalen Warenkauf von 1980
Bern, 2004
CITED IN: paras. 75, 86
(CITED AS: *Brunner*)

BUNDESTAG
Bill of the Arbitration Law Reform Act
in: BT-Drs. 13/5274
CITED IN: para. 16
(CITED AS: *BT-Drs. 13/5274*)

CARBONNEAU, THOMAS
Cases and Materials on Commercial Arbitration
New York, 1997
CITED IN: para. 1
(CITED AS: *Carbonneau*)

ENDERLEIN, FRITZ
Rights and Obligations of the Seller under the Vienna Convention: A shift above Comparative Law
in: Petar Sarcevic/ Paul Volken, International Sale of Goods
USA, 1986
CITED IN: para. 90
(CITED AS: *Enderlein*)

ENDERLEIN, FRITZ
MASKOW, DIETRICH
STROHBACH, HEINZ
Internationales Kaufrecht – Kaufrechtskonvention, Verjährungskonvention, Rechtsanwendungskonvention
Berlin, 1992
CITED IN: paras. 81, 90
(CITED AS: *Enderlein/Maskow/Strohbach*)

FERRARI, FRANCO
KIENINGER, EVA-MARIA
MANKOWSKI, PETER
OTTE, KARSTEN
SAENGER, INGO
STAUDINGER, ANSGAR

Internationales Vertragsrecht
EGBGB, CISG, CMR, FactÜ
Munich, 2007
CITED IN: paras. 65, 72, 83, 90
(CITED AS: *Ferrari/Kieninger/Mankowski/Otte/ Saenger/ Staudinger-author*)

FOUCHARD, PHILIPPE
GAILLARD, EMMANUEL
GOLDMAN, BERTHOLD

On International Commercial Arbitration
The Hague, 1999
CITED IN: para. 22
(CITED AS: *Fouchard/Gaillard/Goldman*)

HERBER, ROLF
CZERWENKA, BEATE

Internationales Kaufrecht
Munich, 1991
CITED IN: paras. 65, 81
(CITED AS: *Herber/Czerwenka*)

HONNOLD, JOHN O.

Uniform Law For International Sales under the 1980 United Nations Convention
3rd Edition, The Hague, 1999
CITED IN: paras. 63, 68, 81, 83
(CITED AS: *Honnold*)

HONSELL, HEINRICH

Kommentar zum UN-Kaufrecht
Heidelberg, 1997
CITED IN: paras. 68, 73, 75, 77, 90
(CITED AS: *Honsell-author*)

HUBER, PETER
MULLIS, ALASTAIR

The CISG – A new textbook for students and practitioners
Regensburg, 2007
CITED IN: paras. 61, 72, 75
(CITED AS: *Huber/Mullis*)

LEW, JULIAN D.
MISTELIS, LOUKAS A.
KRÖLL, STEFAN M.
Comparative International Commercial Arbitration
The Hague, 2003
CITED IN: paras. 1, 22, 39
(CITED AS: *Lew/Mistelis/Kröll*)

MONESTIER, TANYA
"Nothing comes of nothing"… or does it??? A critical re-examination of the doctrine of separability in American Arbitration
American Review of International Arbitration
2001, pp. 242 – 247
CITED IN: paras. 4, 6
(CITED AS: *Monestier, 12 Am. Rev. Int`l Arb. 223*)

MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH
Band 3 – Schuldrecht – Besonderer Teil I
§§ 433 – 610, CISG
4th edition, Munich, 2004
CITED IN: paras. 71, 77
(CITED AS: *MüKo/BGB-author*)

MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH
Band 6 – Handelsgschäfte – Handelskauf - Kommissionsgeschäfte
§§ 373 – 406, CISG
2nd edition, Munich 2007
CITED IN: paras. 68, 77
(CITED AS: *MüKo/HGB-author*)

NEWMAN, LAWRENCE W.
NEWMAN
HILL, RICHARD D.
The leading arbitrator's guide to International Arbitration
New York, 2004
CITED IN: para. 39
(CITED AS: *Newman/Hill*)

PILZ, BURGHARD
Internationales Kaufrecht
Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung
Munich, 1993
CITED IN: paras. 69, 77
(CITED AS: *Pilz*)

RAMBERG, CHRISTINA
CISG-AC Opinion no.1, Electronic Communications under CISG
Gothenburg, 2003
>http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_1.pdf<
CITED IN: para. 73
(CITED AS: *Ramberg*)

REDFERN, ALAN
HUNTER, MARTIN
Law and Practice of International Commercial Arbitration
4th edition, London, 2004
CITED IN: para. 22,
(CITED AS: *Redfern/Hunter*)

SCHLECHTRIEM, PETER
SCHWENZER, INGEBORG
Commentary on the UN Convention on International Sale of Goods (CISG)
2nd (english) edition, Oxford, 2005
CITED IN: paras. 39, 61, 63, 64, 65, 66, 67, 68, 69, 75, 79, 90
(CITED AS: *Schlechtriem/Schwenzer-author*)

SCHWAB, KARL HEINZ
WALTER, GERHARD
Schiedsgerichtsbarkeit
7th edition, Munich, 2005
CITED IN: para. 39
(CITED AS: *Schwab/Walter*)

SMIT, ROBERT H.
Ex nihilo nihil fit? Or can something indeed come from nothing?
American Review of International Arbitration 2002, pp. 19 - 37
CITED IN: paras. 5, 10
(CITED AS: *Smit, 13 Am. Rev. Int'l Arb. 19*)

STAUDINGER, JULIUS VON
MAGNUS, ULRICH
Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)
15th edition, Berlin, 2005
CITED IN: paras. 61, 64, 72, 77, 83, 90
(CITED AS: *Staudinger-author*)

STEIN, FRIEDRICH
JONAS, MARTIN
Kommentar zur Zivilprozessprozessordnung
22nd edition, Band 9, §§ 916-1068, Tübingen, 2002
CITED IN: para. 39
(CITED AS: *Stein/Jonas-author*)

SUTTON, DAVID ST. JOHN
KENDALL, JOHN
GILL JUDITH
Russel on Arbitration
21st edition, London, 1997
CITED IN: para. 45
(CITED AS: *Sutton/Kenall/Gill*)

THOMAS, HEINZ
PUTZO, HANS
REICHOLD, KLAUS
HÜßTEGE, RAINER
Zivilprozessordnung
28th edition, Munich, 2005
CITED IN: para. 22
(CITED AS: *Thomas/Putzo/Reichold/Hüßtege-author*)

UNCITRAL
Analytical Commentary on Draft Text of a Model Law on international Commercial Arbitration
Report of the Secretary-General (A./CN.9/264)
CITED IN: para. 33
(CITED AS: *UNCITRAL, Analytical Com.*)

UNCITRAL — UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 *bis* as adopted in 1998
New York, 1999
>http://www.uncitral.org/pdf/english/ texts/electcom/05-89450_Ebook.pdf<
CITED IN: para. 72
(CITED AS: *UNCITRAL EC Guide*)

WEIGAND, FRANK-BERND — Practitioner's Handbook on International Arbitration
Munich, 2002
CITED IN: para. 22
(CITED AS: *Weigand-author*)

INDEX OF COURT CASES

	CASE NO. 129/2003 CISG-online No. 1207 CITED IN: para. 57 (CITED AS: *Russian Ch. Of Comm. (Russia 2004)*)
SWITZERLAND	
02.12.2004	KANTONSGERICHT ZUG **A3 2004 30** CISG-online No. 1194 CITED IN: paras. 57, 58 (CITED AS: *Kantonsgericht Zug (Switzerland 2004)*)
UNITED STATES OF AMERICA	
13.07.1978	UNITED STATES DISTRICT COURT, S.D. NEW YORK **455 F. Supp. 211, 219** Pollux Marine Agencies v. Louis Dreyfus Corp. >http://www.westlaw.com CITED IN: para. 5 (CITED AS: *Pollux Marine Agencies v. Louis Dreyfus Corp. (U.S. 1978)*)
05.02.1991	UNITED STATES COURT OF APPEALS (NINTH CIRCUIT) **925 F.2d 1136** Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc. >http://www.westlaw.com CITED IN: para. 4 (CITED AS: *Three Valleys Mun.Water Dist. v. E.F. Hutton & Co (U.S. 1991)*)

21.07.2000	UNITED STATES COURT OF APPEALS (THIRD CIRCUIT) **220 F.3d 99, 106** Sandvik AB v. Advent Intern. Corp. >http://www.westlaw.com< CITED IN: para. 4 (CITED AS: *Sandvik AB v. Advent Int'l Corp. (U.S. 2000)*)
03.07.2001	UNITED STATES COURT OF APPEALS (SEVENTH CIRCUIT) **256 F.3d 587, 591** Sphere Drake Ins. Ltd. v. All American Ins. Co. >http://www.westlaw.com< CITED IN: para. 4 (CITED AS: Sphere Drake Ins. Ltd. v. All American Ins. Co. (U.S 2001))
15.09.2001	SUPREME COURT OF ALABAMA **794 So.2d 312** Alabama Catalog Sales v. Harris >http://www.westlaw.com< CITED IN: para. 6 (CITED AS: *Alabama Catalog Sales v. Harris (U.S. 2001)*)
01.10.2001	UNITED STATES COURT OF APPEALS (SIXTH CIRCUIT) **267 F.3d 483, 488** Burden v. Check into Cash of Kentucky, LLC >http://www.westlaw.com< CITED IN: para. 4 (CITED AS: *Burden v. Check Into Cash of Kentucky, LLC (U.S. 2001)*)

22.01.2003	UNITED STATES DISTRICT COURT, S.D. NEW YORK **242 F. Supp. 2d 344, 349** Canada Life Assur. Co. v. Guardian Life Ins. Co. of America >http://www.westlaw.com< CITED IN: para. 4 (CITED AS: *Canada Life Assurance Co. v. Guardian Life Insurance Co. (U.S. 2003)*)

INDEX OF ARBITRAL AWARDS

International Chamber of Commerce

INDEX OF LEGAL SOURCES

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, OF 10 JUNE 1958 (NEW YORK)
(CITED AS: NY CONVENTION)

JAMS (JUDICIAL ARBITRATION AND MEDIATION SERVICES) INTERNATIONAL ARBITRATION RULES, OF APRIL 2005
(CITED AS: JAMS RULES)

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, OF 1996
(CITED AS: UNCITRAL EC)

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, OF 1985
(CITED AS: MAL)

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), OF 11 APRIL 1980
(CITED AS: CISG)

STATEMENT OF FACTS

Early **May 2006** a buying team of Equatoriana Super Markets S.A. (hereinafter: RESPONDENT) and the representatives of Mediterraneo Wine Cooperative (hereinafter: CLAIMANT) met at the Durhan wine fair. RESPONDENT was interested in featuring Blue Hills 2005 as the lead wine in its major wine promotion that it was planning for the month of October. By the exchange of letters between **14 May 2006** and **1 June 2006** the Parties discussed the price and possible discounts depending on the quantity ordered. On **10 June 2006** RESPONDENT sent an e-mail and a letter to CLAIMANT including an offer to purchase 20,000 cases of Blue Hills 2005 for $68.00 per case. This offer was embedded in an enclosed Purchase Order which framed the requisite details and included an arbitration clause. Furthermore, RESPONDENT drew CLAIMANT's attention to the fact that the date of the promotion had been moved forward from October to September and that it therefore "would have to turn to another quality wine as the featured item […] if the contract closing were to be delayed beyond 21 June 2006". On **13 June 2006** the first of several articles about the usage of anti-freeze fluid in the production of wine in the Blue Hills wine region was published in Mediterraneo. On **16 June 2006** and on the following days articles about the "scandalous" production methods appeared in Equatoriana. On Sunday, **18 June 2006**, RESPONDENT revoked its offer of 10 June 2006 by sending an e-mail to CLAIMANT. The message was received by CLAIMANT's server on 18 June 2006, but due to a service failure the e-mail was received by CLAIMANT's sales manager, Mr. Cox, not earlier than in the afternoon of 19 June 2006. Meanwhile, in the morning of 19 June 2006, Mr. Cox had signed the Purchase Order and sent it to RESPONDENT via courier. In its e-mail of **20 June 2006** RESPONDENT reiterated that it had effectively revoked its offer before CLAIMANT dispatched its acceptance.

On **21 June 2007** Judicial Arbitration and Mediation Services (hereinafter: JAMS) acknowledged receipt of CLAIMANT's request for arbitration and sent a notification of the request to RESPONDENT. On **4 July 2007** RESPONDENT applied to the Commercial Court of Vindobona, Danubia requesting a declaration that no arbitration agreement is in existence between the Parties. On **17 July 2007** RESPONDENT submitted its Statement of Defense, and enclosed the acknowledgement that it had brought this case before the Commercial Court of Vindobona.

In view of the above facts, we respectfully make the following submissions on behalf of our client Equatoriana Super Markets S.A., RESPONDENT, and request the Arbitral Tribunal to hold that:

- The Parties never concluded a valid arbitration agreement **[First Issue]**.
- The Arbitral Tribunal should grant a stay of the arbitral **[Second Issue]**.
- In case Art. 17(3) JAMS Rules was violated the Tribunal should not draw any adverse consequences **[Third Issue]**.
- A sales contract was never concluded between CLAIMANT and RESPONDENT **[Fourth Issue]**.
- Blue Hills 2005 is not fit for the particular purpose made to CLAIMANT **[Fifth Issue]**.

FIRST ISSUE: THE PARTIES NEVER CONCLUDED A VALID ARBITRATION AGREEMENT.

1 CLAIMANT correctly acknowledges that "arbitration can only take place if the parties have agreed thereto, as the arbitration system is based on the free will of the parties" (*Cl's Memo. at 7).* The arbitral process is consensual in nature, thus the mutual assent of the parties is essential (*Lew/Mistelis/Kröll, para. 6-1; Brown/Marriott, para. 4-014; Carbonneau, p. 23*). However, in the case at hand, CLAIMANT and RESPONDENT never concluded a valid arbitration agreement. RESPONDENT indeed issued an offer to purchase Blue Hills 2005 which included various provisions, one of which was an arbitration clause. But RESPONDENT validly revoked this offer (*infra fourth issue*). Since a sales contract therefore never came into existence, neither did an arbitration agreement [**A.**]. Should the Tribunal consider the offer to conclude an arbitration agreement to be separable from the offer to conclude a sales contract there still has been no valid arbitration agreement as RESPONDENT validly revoked its offer to conclude an arbitration agreement on 18 June 2006 [**B.**].

A. There was no arbitration agreement because it shares the fate of the sales contract which never came into existence.

2 CLAIMANT`s allegation that due to the doctrine of separability, the arbitration agreement is supposed to "constitute a contract separate from the commercial contract" *(Cl`s Memo. at 19)* is untenable. RESPONDENT will demonstrate that the doctrine of separability does not

apply in cases where the main contract is non-existent [**I.**]. Therefore, the arbitration agreement shares the fate of the sales contract – it never came into existence [**II.**].

I. The doctrine of separability does not apply where the main contract is non-existent.

3 CLAIMANT asserts that the arbitration agreement is valid even in case no sales contract was concluded because – due to the principle of separability – the fate of the main contract does not affect the fate of the agreement to arbitrate *(Cl`s Memo. at 19)*. This reasoning, however, is flawed.

4 It is widely accepted today "that a contract that never came into legal existence cannot contain a valid and binding arbitration provision" *(Monestier, 12 Am. Rev. Int`l Arb. 223)*. Where the main contract is void *ab initio* or never came into existence, the doctrine of separability does not apply *(Sphere Drake Ins. Ltd. v. All American Ins. Co (U.S. 2001); Burden v. Check Into Cash of Kentucky, LLC (U.S. 2001); Sandvik AB v. Advent Int'l Corp. (U.S. 2000); Three Valleys Mun.Water Dist. v. E.F. Hutton & Co. (U.S. 1991); Canada Life Assurance Co. v. Guardian Life Insurance Co. (U.S. 2003)*. This exception of the exclusion of the doctrine of separability is even acknowledged by CLAIMANT *(Cl`s Memo. at 22)*.

5 The basic rationale for refusing to apply the doctrine of separabiltiy in cases where the contract containing an arbitration clause never came into existence or is otherwise void lies in the principle of *ex nihilo nihil fit* – from nothing nothing comes *(Smit, 13 Am. Rev. Int´l Arb. 19)*. This principle was perhaps best expressed in *Pollux Marine Agencies v. Louis Dreyfus Corp.*: "something can be severed only from something else that exists. How can the Court 'sever' an arbitration clause from a non-existent [contract]?" *(Pollux Marine Agencies v. Louis Dreyfus Corp. (U.S. 1978))*.

6 It should be clear that a party cannot be forced to arbitrate in a case where the main contract does not contain a valid arbitration clause. In conclusion, if the contract containing the arbitration clause, and therefore giving the arbitration clause its viability, is found to be void or to never have existed, a party cannot be forced to arbitrate either (*cf. Alabama Catalog Sales v. Harris (U.S. 2001))*. Thus, the unenforceability of the underlying contract extends to the contract's arbitration clause and thereby precludes a finding that the parties concluded an independent agreement to arbitrate *(cf. Monestier, 12 Am. Rev. Int´l Arb. 223)*.

II. Since a sales contract was never concluded neither was an arbitration agreement.

7 In the case at hand RESPONDENT validly revoked its offer to conclude a sales contract (*infra fourth issue*). Thus, a sales contract never came into existence. As explained above the principle of separability does not apply in such cases. Consequently, the arbitration clause contained therein shares the fate of the sales contract – it never came into existence.

B. In any event there is no arbitration agreement as RESPONDENT validly revoked its offer to conclude an arbitration agreement on 18 June 2006.

8 Even if the Tribunal should find that the doctrine of separability does apply in the case at hand, there still has been no agreement to arbitrate as RESPONDENT validly revoked its offer to conclude an arbitration agreement on 18 June 2006.

9 On 18 June 2006 RESPONDENT`s Principal Wine Buyer, Mr. Wolf, sent an e-mail to CLAIMANT providing that RESPONDENT is "withdrawing [its] offer to purchase […] made […] on 10 June 2006" *(Cl`s Ex. No. 9)*. As the offer to conclude the sales contract and the offer to conclude an arbitration agreement were both included in the same document – namely in the Purchase Order of 10 June 2006 *(Cl`s Ex. No. 5)* – the e-mail could only be understood by CLAIMANT as a revocation of all legally significant statements contained in the Purchase Order.

10 The fact that RESPONDENT did not specifically mention the offer to conclude an arbitration agreement in its e-mail of 18 June 2006 does not lead to a different conclusion. In this regard, it has to be borne in mind that Equatoriana Super Markets' Principle Wine Buyer, Mr. Wolf, and Mediterraneo Wine Cooperatives' Sales Manager, Mr. Cox, are business persons. As such they cannot be expected to always use the legally correct phrases to express their intentions. It would be formalistic if one would require a businessman to revoke all legally distinguishable aspects of a statement made in a single commercial document. This is particularly so in light of the fact that the doctrine of separability is a highly complex legal principle. "Indeed, many parties (and their counsel) to a contract would be surprised to hear that they have concluded not one but two separate agreements" *(Smit, 13 Am. Rev. Int'l Arb. 19)*.

11 What matters is that RESPONDENT expressed itself in a way that CLAIMANT – as a business person – could only understand as referring to the Purchase Order as a whole, i.e. to all possible legal effects connected with it.

12 This is underlined by the fact that the Purchase Order foresaw that by putting a single signature under the document, a sales contract as well as an arbitration agreement should have been concluded. Thus, from a business point of view it was not necessary that RESPONDENT explicitly revoked all offers contained in the document.

13 Consequently, by its e-mail of 18 June 2006, RESPONDENT adequately expressed its intention not to be bound by any legally significant statements contained in the Purchase Order of 10 June 2006. Since RESPONDENT's e-mail was received by CLAIMANT within due time, the offer to conclude an arbitration agreement has been validly revoked.

SECOND ISSUE: THE ARBITRAL TRIBUNAL SHOULD GRANT A STAY OF THE ARBITRAL PROCEEDINGS.

14 RESPONDENT validly applied to the Commercial Court of Vindobona (hereinafter: Comm. Ct.) to determine whether or not an arbitration agreement was concluded between the Parties [**A.**]. To avoid parallel proceedings, the Arbitral Tribunal must stay the arbitral proceedings [**B.**].

A. RESPONDENT validly applied to the Commercial Court of Vindobona.

15 By virtue of Art. 8(2) Danubian Arbitration Law (hereinafter: DAL) RESPONDENT's application to the Comm. Ct. of Vindobona was valid [**I.**]. The right to apply to the Commercial Court is not affected by Art. 17(3) JAMS Rules as this provision does not constitute a valid agreement concluded between the Parties [**II.**].

I. RESPONDENT validly applied to the Commercial Court of Vindobona pursuant to Art. 8(2) DAL.

16 By applying to the Commercial Court of Vindobona within the time limit stated in Art. 8(2) DAL, RESPONDENT validly commenced its action for declaratory judgement. Art. 8(2) DAL provides that prior to the constitution of the arbitral tribunal an application may be made to the court to determine whether or not arbitration is admissible. The purpose of this provision is to uphold the principle of procedural economy by providing the possibility of an early decision on the question of jurisdiction *(see concerning § 1032(2) ZPO, being the equivalent of Art. 8(2) DAL: BT-Drs. 13/5274, p. 38)*.

17 The relevant moment concerning the question whether or not the arbitral tribunal needs be regarded as constituted is the one in which the application was made to the court *(Musielak-*

Voit, Art.1032, para. 10). In general an arbitral tribunal is considered to be constituted at the moment when the last arbitrator is appointed by the parties *(cf. supra at 4)*. In the case at hand, RESPODENT filed its application to the Comm. Ct. on 4 July 2007 *(P.O. No.2 at 9)*. The last arbitrator of the three-member tribunal has been appointed on 17 August 2007 when Prof Dr. Presiding accepted his appointment as chairman of the Arbitral Tribunal. Therefore, RESPONDENT filed its application to the Comm. Ct. within the time limit stated in Art. 8(2) DAL.

18 CLAIMANT's assertion that Art. II(3) New York Convention on the Recognition and Enforcement of Forgein Arbitral Awards (hereinafter: NY Convention) requires national courts to stay legal proceedings in case of a valid arbitration agreement *(cf. Cl's Mem. at 4)* is beside the point. Art. II(3) NYC concerns the case where a Party starts an action before a state court on the merits of the case. It does not relate to applications as the one before the Comm. Ct.. The purpose of such applications is in fact to determine whether an arbitration agreement exists.

19 Thus, RESPONDENT validly commenced its action for declaratory judgement to determine whether or not an arbitration agreement was concluded between the Parties.

II. Art. 17(3) JAMS Rules does not preclude RESPONDENT's right to apply to the Commercial Court.

20 Art. 17(3) JAMS Rules does not in any way affect the admissibility of RESPONDENT's application before the Comm. Ct.. Firstly, the Parties never agreed on Art. 17(3) JAMS Rules as no arbitration agreement was concluded [**1.**]. Secondly, even if the Arbitral Tribunal finds that the Parties concluded an arbitration agreement, any stipulation concerning Art. 17(3) JAMS Rules is invalid as it would contradict the mandatory provision of Art. 8(2) DAL [**2.**]. Should the Arbitral Tribunal find that the Parties validly agreed on Art. 17(3) JAMS Rules this does not have any effect on the admissibility of RESPONDENT's application as it does not have any procedural effect [**3.**].

1. CLAIMANT and RESPONDENT did not agree on Art. 17(3) JAMS Rules.

21 As shown above, CLAIMANT and RESPONDENT did not agree on the arbitration clause contained in the Purchase Offer [see above: **First Issue**]. Thus, there never was an agreement on the JAMS Rules, including Art. 17(3) JAMS Rules. Consequently, Art. 17(3) JAMS Rules cannot restrict RESPONDENT's right to apply to the Comm. Ct. pursuant to Art. 8(2) DAL.

2. Additionally, Art. 17(3) JAMS Rules does not constitute a valid agreement as it contradicts the mandatory provision of Art. 8(2) DAL.

22 Irrespective of the question whether or not an arbitration agreement was concluded between the Parties, any stipulation concerning Art. 17(3) JAMS Rules is invalid as it would contradict the mandatory provision of Art. 8(2) DAL. The Arbitral Tribunal should bear in mind that the principle of party autonomy is not an unrestricted one as it is limited by the mandatory provisions of the *lex arbitri (Thomas/Putzo/Reichold/Hüßtege-Thomas/Reichold, §1042 para. 5; Weigand-Roth*, *p. 1230, para. 2; Redfern/Hunter para. 6-08; Fouchard/Gaillard/Goldman, para. 1200; Lew/Mistellis/Kröll, para. 17-27)*.

23 Art.17(3) JAMS Rules states that the Parties will be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the question of jurisdiction. This general prescription is subject to three exceptions. First, an action before a court is admissible if all Parties agreed to litigate. Second, an application may 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. Contrary to Art. 17(3) JAMS Rules, Art. 8(2) DAL in general terms provides that prior to the constitution of the arbitral tribunal an application may be made to the court. It appears therefore, that the restrictive rule in Art. 17(3) JAMS Rules contradicts the legal arrangement of Art. 8(2) DAL.

24 Art. 8(2) DAL, however, is a mandatory provision that cannot be derogated from by the parties *(concerning the equivalent provision of the German Code of Procedure, Böckstiegel/Kröll/Nacimiento-Huber, § 1032 para. 42)*. The mandatory character of Art. 8(2) DAL is shown by the fact that the wording of this provision does not contain any indication that the Parties may derogate from it. The non-mandatory character of other provisions of the DAL, like Artt. 3, 17 and 21, is usually expressed by the introduction "Unless otherwise agreed by the parties […]". Art. 8(2) DAL, however, does not contain such a wording.

25 The mandatory character of Art. 8(2) DAL is underlined by the fact that other arbitration laws expressly state that provisions like Art. 8(2) DAL have a mandatory character. Sec. 4 in conjunction with schedule 1 of the English Arbitration Act (hereinafter: EAA) provides that Sec. 32 EAA – a provision which allows an application to the state courts regarding the arbitral tribunal's jurisdiction – is mandatory. Thus, according to Sec. 4(1) EAA this provision has "effect notwithstanding any agreement to the contrary". The same must be true with Art. 8(2) DAL.

26 Thus, any stipulation of the Parties concerning Art. 17(3) JAMS Rules needs to be regarded as invalid because this provision contradicts the mandatory provision of Art. 8(2) DAL.

3. Even if the Parties validly agreed on Art. 17(3) JAMS Rules this does not have any effect on the admissibility of RESPONDENT's application.

27 Even if the Arbitral Tribunal finds that the Parties validly agreed on Art. 17(3) JAMS Rules, RESPONDENT was not precluded from applying to the Comm. Ct.. The agreement contained in Art. 17(3) JAMS Rules has no influence on the admissibility of the application as the Parties did not intend it to have any procedural effects.

28 To have any impact on the admissibility of the application before the Comm. Ct. Art.17(3) JAMS Rules would have to be considered as having a procedural effect. However, Art. 17(3) JAMS Rules can only be regarded as constituting a purely substantive agreement. This view is underlined by the wording of Art. 17(3) JAMS Rules which does not contain any indication that the Parties intended it to affect the procedural admissibility of an application. Rather, it provides that "[b]y agreeing to arbitration under these Rules, the parties will be treated as having agreed not to apply to any court […]". A violation of Art. 17(3) JAMS Rules could therefore – if this provision is considered to be of a mandatory character at all – only entail standard contractual remedies, such as damages, if any have occurred. Under no circumstances could Art. 17(3) JAMS Rules lead to the inadmissibility of an application before the Comm. Ct..

29 Thus, even if the Tribunal finds that the Parties have agreed on Art. 17(3) JAMS Rules RESPONDENT still validly applied to the Comm. Ct. in accordance with Art. 8(2) DAL.

B. The Arbitral Tribunal must grant a stay of the arbitral proceedings while the application before the Commercial Court is pending.

30 Art. 8(3) DAL allows the Arbitral Tribunal to continue the arbitral proceedings while an application before a state court is pending. However, according to its purpose it does not allow continuance of the proceedings in the case at hand [**I.**]. Furthermore, a stay should be granted to prevent a futile waste of resources caused by parallel proceedings [**II.**].

I. The Arbitral Tribunal must stay the arbitral proceedings as Art. 8(3) DAL does not allow continuance of the arbitral proceedings in the case at hand.

31 According to its purpose, Art. 8(3) DAL only allows the continuance of arbitral proceedings where a party only applies to the state court to delay the arbitral proceedings [**1.**]. However,

in the case at hand RESPONDENT's application to the Comm. Ct. does not constitute a delaying tactic [**2.**].

1. Pursuant to the purpose of Art. 8(3) DAL arbitral proceedings may only be continued where the application before the state court constitutes a delaying tactic.

32 Art. 8(3) DAL constitutes an exception to the general rule that arbitral tribunals will stay the proceedings where their competence is being considered by a court (*Böckstiegel/Kröll/Nacimientö-Huber, § 1032 para. 62*).CLAIMANT may not assert that the Parties restricted the arbitrator's power to stay the proceedings by virtue of Art. 17(3) JAMS Rules. Art. 17(3) JAMS Rules does not contain any indication whatsoever from which one could derive such a meaning. In any event, Art. 17(3) JAMS Rules does not contain a valid agreement between the Parties concerning the arbitral procedure. As shown above it violates the mandatory provision of Art. 8(2) DAL. However, pursuant to Art. 19(1) DAL the Parties are only free to agree on a procedure subject to the mandatory provisions of the lex loci arbitri. Therefore, the Arbitral Tribunal has the authority to stay the arbitral proceedings awaiting a decision of the Comm. Ct..

33 The purpose of Art. 8(3) DAL is to reduce the risk and effect of delaying tactics *(concerning the equivalent provision of Art. 8(2) MAL: UNCITRAL, Analytical Com., p. 67; Böckstiegel/Kröll/Nacimiento-Huber, § 1032 para. 61)*. Consequently, an arbitral tribunal may only continue the arbitral proceedings where it considers the application to a state court made by a party to constitute a delaying tactic. This can only be the case where the application is obviously unfounded. Art. 8(3) DAL does not, however, concern the case where a party applies to the court for a good reason.

2. A stay must be granted as RESPONDENT's application before the Comm. Ct. does not constitute a delaying tactic.

34 RESPONDENT's application before the Comm. Ct. does not constitute a delaying tactic. As mentioned above, an application can only be considered to be a delaying tactic where it is obviously without merits, meaning that there obviously is an arbitration agreement. In the case at hand, however, it is evident that the Parties did not conclude an arbitration agreement *(see above **First Issue**)*. In any event it is not at all obvious that there has been a valid arbitration agreement.

35 Additionally, RESPONDENT applied to the Comm. Ct. before the Arbitral Tribunal even was constituted. How can RESPONDENT delay arbitral proceedings which haven't even

begun? RESPONDENT's behaviour was not intended to delay the proceedings, but rather to opt for a quick resolution of the dispute. This is, after all, the purpose of Art. 8(2) DAL which provides for an early court review on the question of jurisdiction *(concerning § 1032 (2) ZPO, Böckstiegel/Kröll/Nacimientö-Huber, § 1032 para. 41; Stein/Jonas-Schlosser, § 1032 para. 21)*. Thus, RESPONDENT's application does not constitute a delaying tactic.

36 Therefore, the Arbitral Tribunal may not continue the arbitral proceedings relying on Art. 8(3) DAL. Rather, it must grant a stay awaiting a decision of the Comm. Ct..

II. Additionally, the Arbitral Tribunal should grant a stay of arbitral proceedings to prevent a futile waste of resources caused by parallel proceedings.

37 In the case at hand, continuing the arbitral proceedings despite the fact that RESPONDENT's application is pending before the Commercial Court would be futile. Should the Commercial Court decide that the Arbitral Tribunal lacks jurisdiction, any decision of the Arbitral Tribunal would be bereft of any relevance as it is the state courts who ultimately decide upon the question of jurisdiction [**1.**]. Thus, to avoid a waste of resources caused by continuing the arbitral proceedings, a stay should be granted [**2.**].

1. A decision of the Arbitral Tribunal would be bereft of any relevance if the Commercial Court decided that there is no arbitration agreement.

38 If the Arbitral Tribunal's jurisdiction is denied by the Commercial Court, any decision of the Arbitral Tribunal would be bereft of any relevance.

39 Any decision given by an Arbitral Tribunal as to its jurisdiction is subject to control by the courts of law, which in this respect have the last word *(Newman/Hill, p. 84; Lew/Mistelis/Kröll para. 14-32; Berger, p. 328)*. In the case at hand, an application for declaratory judgement has already been made by RESPONDENT before the Comm. Ct. of Vindobona. It is highly probable that the Comm. Ct. decides that there has been no valid arbitration agreement. Should the Arbitral Tribunal nevertheless continue the arbitral proceedings and render an award, any award rendered in such circumstances would unhesitatingly be set aside *(Newman/Hill p.114)*. This is due to the fact that, pursuant to Art. 34(2)(a)(i) DAL, the award has to be set aside if there is no valid arbitration agreement. The court deciding on the motion to set the award aside would be bound by the decision rendered by the Commercial Court on RESPONDENT's application for declaratory judgment *(Stein/Jonas-Schlosser, § 1032 para. 22; Schwab/Walter, p. 151 para. 49)*. Therefore, an award rendered despite a ruling from the Comm. Ct. that the Arbitral Tribunal lacks

jurisdiction would practically have no legal effect.

2. In order to avoid a waste of resources a stay should be granted.

40 Continuing the arbitral proceedings would constitute a futile exercise and would entail the danger that the time and money spent in the course of the proceedings would be utterly wasted. Therefore, the Arbitral Tribunal should stay the arbitral proceedings awaiting the decision of the Comm. Ct..

41 As explained above, it is the Comm. Ct. who ultimately rules on the question of jurisdiction, not the Arbitral Tribunal. It would make no sense to continue the arbitral proceedings when a final decision on the question of jurisdiction will be rendered by the Comm. Ct.. The best course for the Arbitral Tribunal to take is to stay arbitral proceedings awaiting the final decision of the Comm. Ct. providing legal certainty on the issue. This view is in conformity with the generally accepted principle that arbitral tribunals who know that their competence is being considered by a court, will prefer not to continue with their proceedings and will await the ruling of the court *(Berger, p. 330; OLG Saarbrücken (Germany, 1960))*.

42 Should the Comm. Ct. decide that there was no arbitration agreement, the Parties would have spent time and money in an arbitration that does not further their cause. It would be wiser to stay the arbitral proceedings.

43 Therefore, the arbitral proceedings should be stayed awaiting the Commercial Court's ruling on the jurisdiction.

THIRD ISSUE: IN CASE ART. 17(3) JAMS RULES WAS VIOLATED THE TRIBUNAL SHOULD NOT DRAW ANY ADVERSE CONSEQUENCES.

44 Assuming, but not conceding, that Art. 17(3) JAMS Rules was violated, the Arbitral Tribunal should not draw any consequences to the detriment of RESPONDENT. First, a violation of Art. 17(3) JAMS Rules cannot have any impact on the apportioning of the arbitration costs [**A.**]. Second, a violation of Art. 17(3) JAMS Rules should not lead the Tribunal to order RESPONDENT to withdraw its application before the Commercial Court of Vindobona [**B.**]. Finally, the Tribunal may not award CLAIMANT any damages relying on a violation of Art. 17(3) JAMS Rules [**C.**].

A. A violation of Art. 17(3) JAMS Rules would not have any impact on the apportioning of the arbitration costs.

45 A violation of Art. 17(3) JAMS Rules would not have any impact on the apportioning of the arbitration costs. According to Art. 34(4) JAMS Rules the apportioning of the arbitration costs is left to the Tribunal. Art. 34(4) s. 2 states that "the Tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case". The principal guideline for the decision on the allocation of costs for the arbitration is that „the costs of the arbitration are [usually] borne by the unsuccessful party" […] taking into account the conduct of the parties during the arbitration, especially obstructionist tactics of one party which have caused substantial […] costs" *(Berger, p. 617; cf. ICC Award No. 7006 (1992); ICC Award No. 5622 (1988); ICC Award No. 8486 (1996); Sutton/Kendall/Gill, para. 6-165)*. There is no reason why the Arbitral Tribunal should deviate from this general rule in the case at hand.

46 Taking RESPONDENT`s "conduct" as well as the "circumstances of the case" into account, an apportioning of the costs to the detriment of RESPONDENT would be unjustified. First of all the Tribunal should bear in mind that apart from a deviation from Art. 17(3) JAMS Rules RESPONDENT did act in complete conformity with the JAMS Rules.

47 Furthermore, the application before the Comm. Ct. itself did not constitute a conduct that would justify a different allocation of the costs. As shown above, RESPONDENT did not use the application as a tactic to cause a substantial delay of the proceedings. Furthermore by applying to the Comm. Ct. RESPONDENT did not cause any additional costs that would not have occurred in any way. CLAIMANT alleges that commencing litigation would force CLAIMANT "to spend more that it would have to, had the action in the court not been commenced" *(Cl`s Memo. at 29)*. While it is true that an application before a state court causes expenses, these expenses would also have occurred if there had *not* been an application to the Comm. Ct. in violation of Art. 17(3) JAMS Rules. This is due to the fact that, according to Art. 16(3) s. 2 DAL, RESPONDENT would have had the opportunity to apply to a state court at a later point in time without violating Art. 17(3) JAMS Rules. Art. 17(3) JAMS Rules states that "by agreeing to arbitration under these Rules, the Parties will be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the Tribunal`s jurisdiction, except […] following the [Tribunal´s] ruling on the objection to its jurisdiction". Hence, once the Tribunal has decided upon its jurisdiction, Art. 17(3) JAMS Rules does not bar RESPONDENT from applying to the state courts regarding

the question of jurisdiction. Art. 16(3) s. 2 DAL provides that "if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request , within thirty days after having received notice of that ruling, the court […] to decide the matter […]". Thus, RESPONDENT could and would have applied to a state court anyway. Therefore RESPONDENT's application before the Comm. Ct. did not cause expenses which would not have occurred in any way.

48 Thus, a violation of Art. 17(3) JAMS Rules cannot have any impact on the apportioning of the arbitration costs.

B. The Arbitral Tribunal could not order RESPONDENT to withdraw its application before the Commercial Court of Vindobona.

49 The Tribunal cannot order RESPONDENT to withdraw its application before the Comm. Ct.. First of all, the Arbitral Tribunal does not have the authority to order RESPONDENT to withdraw its application before the Comm. Ct.. According to Art. 27(3) JAMS Rules "the Tribunal may draw the inferences that it considers appropriate if a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the Tribunal". However, to "draw inferences" is not to equate with "to sanction". Art. 27(3) JAMS Rules allows the Arbitral Tribunal e.g. to draw adverse conclusions if a party does not provide the information required by the Arbitral Tribunal. However, it may not force a party to a conduct which does not concern the arbitral process itself. The Arbitral Tribunal is therefore not authorized to bar RESPONDENT from commencing its litigation before the Comm. Ct..

50 Furthermore, Art. 27(3) JAMS Rules only allows the Arbitral Tribunal to draw inferences if the party did not have good cause to deviate from the arbitration rules. In the case at hand, however, RESPONDENT did have a valid reason to deviate from Art. 17(3) JAMS Rules. The Arbitral Tribunal should bear in mind that the only reason why RESPONDENT deviated from Art. 17(3) JAMS Rules is that RESPONDENT, at the time of applying to the Comm. Ct., was of the opinion that it had never agreed on Art. 17(3) JAMS Rules. The allegation of CLAIMANT that RESPONDENT "acted in a mala fide manner" *(Cl`s Memo. at 27)* thus is untenable. Furthermore, the Arbitral Tribunal had not yet been constituted at the time RESPONDENT made its application. So at this point in time RESPONDENT had no other option to have legal certainty than to apply to the court. It would not be appropriate

to sanction a behaviour that was neither intended to nor in effect did obstruct the arbitral proceedings.

51 Thus, the Arbitral Tribunal could not order RESPONDENT to withdraw its application before the Comm. Ct..

C. The Arbitral Tribunal could not consider awarding damages to CLAIMANT.

52 The Arbitral Tribunal could not sanction a violation of Art. 17(3) JAMS Rules by awarding damages for breach of contract to CLAIMANT.

53 Apart from the fact that it is in no way curtain that the arbitration clause grants the Tribunal the authority to decide upon an action for damages, CLAIMANT did not suffer any loss. As shown above, no expenses in connection with the application before the Comm. Ct. occurred anyway *(cf. supra at 47)*. Therefore, awarding damages to CLAIMANT relying on a violation of Art. 17(3) JAMS Rules can not be an option for the Arbitral Tribunal.

FOURTH ISSUE: A SALES CONTRACT WAS NEVER CONCLUDED BETWEEN CLAIMANT AND RESPONDENT.

54 Contrary to CLAIMANT's allegations *(Cl's Memo. at 40 et seq.)* a sales contract was never validly concluded between the Parties for two reasons. First, none of CLAIMANT's or RESPONDENT's conduct or statements made prior to the 10 June 2006 constitute a binding offer concerning the sale of Blue Hills 2005 [**A.**]. Secondly, RESPONDENT's offer of 10 June 2006 was never validly accepted by CLAIMANT [**B.**].

A. The Parties' conduct and statements made prior to the 10 June 2006 do not constitute a binding offer to conclude a sales contract.

55 Any conduct or statements made between the Parties prior to the 10 June 2006 cannot constitute a contract concerning the sale of Blue Hills 2005.

56 Any alleged contract closing between CLAIMANT and RESPONDENT is governed by the United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG). According to Art. 1(1)(a) CISG, the Convention applies to the present sales contract as both places of business, namely Equatoriana and Mediterraneo, are in different Contracting States to the CISG *(St. of Claim at 15)*. Since Equatoriana as well as Mediterraneo have adopted the UNCITRAL Model Law on Electronic Commerce (hereinafter: UNCITRAL EC) *(St. of Claim at 16)*, this convention is likewise applicable to

the present sales contract as an amendment to the CISG *(cf. Hilberg, p. 19)*.

57 Art. 23 CISG provides that "a contract is concluded in the moment when an acceptance of an offer becomes effective". Therefore, the conclusion of a contract requires the existence of an offer and an acceptance which refers to the provided offer. According to Art. 14(1) CISG an offer must fulfil three minimum requirements *(cf. Cl's Memo. at 43)*: the offer needs to be addressed to one or more specific persons, it must be sufficiently definite by stating the price and the good (*essentialia negotii*) and it must indicate the offeror's intention to be bound in case of acceptance (*animus contrahendi*) *(cf. LG Neubrandenburg (Germany 2005); Kantonsgericht Zug (Switzerland 2004); Russian Ch. Of Comm. (Russia 2004))*. These minimum requirements are not fulfilled by any conduct or statement provided by RESPONDENT or CLAIMANT prior to the 10 June 2006. At the Durhan wine fair in May 2006 RESPONDENT had no *animus contrahendi* as its buying team was just "looking" for wines for the wine promotion *(cf. St. of Claim at 5)*. In the subsequent correspondence the Parties discussed the *essentialia negotii* of the sales contract, i.e. the amount that "might" be ordered and the price *(St. of Claim at 5; Cl's Ex. Nos. 1,2)*. These letters dated 14 and 22 May 2006 lack a definition of the price and quantity and the offeror's intention to be bound. They merely demonstrate the commencement of contract negotiations between business people. However, they do not constitute a contract closing.

58 CLAIMANT also cannot argue that a sales contract had been concluded between the Parties by the exchange of their letters dated 1 and 10 June 2006. CLAIMANT's letter dated 1 June 2006 *(Cl's Ex. No. 3)* does not constitute a binding offer for the sale of Blue Hills 2005 pursuant to Art. 14(1) s. 2 CISG as it does not exactly determine the quantity and the corresponding price (*essentialia negotii*). Even if the Arbitral Tribunal should consider CLAIMANT's letter dated 1 June 2006 to be sufficiently definite, there has been no acceptance by RESPONDENT on 10 June 2006 *(Cl's Ex. No. 4)*. Pursuant to Art. 19(1) CISG "a reply to an offer which purports to be an acceptance but contains additions […] is a rejection of the offer and constitutes a counter-offer". Para. 2 of the Purchase Order, which completes RESPONDENT's letter dated 10 June 2006, defines the dates for the delivery of four installments. Additionally, para. 13 of the Purchase Order introduces an arbitration clause *(Cl's Ex. No. 5)*. Both issues have never been discussed between the Parties before – neither at the Durhan fair nor in written correspondence. Pursuant to Art. 19(3) CISG these terms relating to the time of delivery and to the settlement of disputes alter the terms of an offer materially. Therefore, RESPONDENT's letter dated 10 June 2006 constitutes a

counter-offer in accordance with Art. 19(1) CISG *(cf. Kantonsgericht Zug (Schweiz 2004))*. Consequently, no contract concerning the sale of Blue Hills 2005 was concluded between the Parties prior to the 10 June 2006.

B. RESPONDENT's offer of 10 June 2006 could not been and was never validly accepted by CLAIMANT.

59 Contrary to CLAIMANT's allegations *(Cl's Memo. at 40 et seq.)* the Parties did not conclude a contract for the purchase of Blue Hills 2005. RESPONDENT's offer of 10 June 2006 was never validly accepted by CLAIMANT. CLAIMANT purports to have accepted this offer by its letter dated 19 June 2006 that reached RESPONDENT on 21 June 2006 *(St. of Claim at 9; Cl's Ex. No. 8; Cl. Memo. at 65 et seq.)*. However, on 19 June 2006 CLAIMANT could not effectively declare its acceptance since RESPONDENT validly revoked its offer on 18 June 2006 [**I.**]. Even if the Arbitral Tribunal should find that the revocation of the offer was delayed, a contract was still not concluded between the Parties due to the lack of a contractual agreement [**II.**].

I. RESPONDENT validly revoked its offer to purchase Blue Hills 2005 on 18 June 2006.

60 On 18 June 2006 RESPONDENT validly revoked its offer to purchase Blue Hills 2005. Contrary to CLAIMANT's assertions *(cf. Cl's Memo. at 51 et seq.)*, RESPONDENT's offer dated 10 June 2006 was revocable [**1.**]. Therefore, RESPONDENT validly revoked its offer in accordance with Art. 16(1) CISG by sending its e-mail to CLAIMANT on 18 June 2006 [**2.**]. Furthermore, and contrary to CLAIMANT's submissions *(cf. Cl's Memo. at 71 et seq.)* RESPONDENT's conduct was in observance of the principle of good faith [**3.**]. Consequently, RESPONDENT's revocation became effective when it reached CLAIMANT on 18 June 2006.

1. RESPONDENT's offer of 10 June 2006 was revocable.

61 According to Art. 16 CISG an offer is generally revocable *(Huber/Mullis-Mullis, p. 81; Staudinger-Magnus, Art. 16 para. 1; Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 2)*. Art. 16(2) CISG provides for an exception to this main rule of revocability *(Bianca/Bonell-Eörsi, Art. 16 para. 2.2; Staudinger-Magnus, Art. 16 para. 9)*. RESPONDENT disagrees with CLAIMANT that the offer provided by RESPONDENT on 10 June 2006 was irrevocable *(cf. Cl's Memo. at 51 et seq.)*. The offer was neither irrevocable pursuant to

Art. 16(2)(a) CISG [**a.**] nor was the revocability of RESPONDENT's offer affected by Art. 16(2)(b) CISG [**b.**].

a. RESPONDENT's offer was not irrevocable pursuant to Art. 16(2)(a) CISG.

62 According to Art. 16(2)(a) CISG an offer cannot be revoked if it indicates that it is irrevocable, i.e. if it indicates the offeror's intention to be bound to his offer. The revocability of RESPONDENT's offer is not affected by this provision as the requirements of Art. 16(2)(a) CISG are not fulfilled. RESPONDENT neither intended to be bound nor did its offer indicate so.

63 Art. 16(2)(a) CISG provides that the intention to be bound *may* be expressed where the offer states a fixed time for acceptance. However, Art. 16(2)(a) CISG is only a rule of interpretation that supplements Art. 8 CISG *(Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 10)*. Therefore, RESPONDENT's statement needs to be interpreted according to the standards laid down in Art. 8 CISG. According to Art. 8(2) CISG statements made by a party are to be interpreted according to the understanding of a reasonable person *(Honnold, Art. 8 para. 107)*.

64 Though RESPONDENT stated in its letter that it "would have to turn to another quality wine as the featured item in [its] promotion if the contract closing were to be delayed beyond 21 June 2006" *(Cl's Ex. No. 4)*, it did not indicate an intention to be bound. The setting of a fixed time is only one factor indicating an intention to be bound *(Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 9)*. The fixing of a period for acceptance provides a rebuttable presumption of the offeror's intention to be bound for that period *(Staudinger-Magnus, Art. 16 para. 12; Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 9)*. An interpretation to the effect that the fixing of a period indicates that the offeror is bound to his offer until the expiry of the period may therefore be rebutted by showing that the period was only intended to indicate that the offer would lapse after that time *(Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 9)*.

65 A reasonable person in CLAIMANT's position could only understand RESPONDENT's statement as intention that its offer lapses after 21 June 2006, i.e. as a fixed time after which the offer expires. It is commonly acknowledged that the wording "Our offer is not good after [21 June 2006]" does not indicate an intention of the offeror to be bound until a fixed time; it rather states that the offer is a revocable one that lapses on the fixed date *(Herber/Czerwenka, Art. 16 para. 9; Bianca/Bonell-Eörsi, Art. 16 para. 2.2.1;*

Ferrari/Kieninger/Mankowski/Otte/ Saenger/ Staudinger-Mankowski, Art. 16 paras. 15,16). RESPONDENT's statement "turn to another … if the contract closing were to be delayed *beyond* 21 June 2006" *(emphasize added) (Cl's Ex. No. 4)* has the same meaning. The reason for RESPONDENT's statement is the fact that the date of its wine promotion had been moved from October to September. In its letter of 10 June 2006 RESPONDENT advised CLAIMAMT of the occurred time pressure ("we must now move quickly"; *Cl's Ex. No. 4*). Due to the time pressure RESPONDENT needed to have certainty at an early stage. The obvious reason for inserting the condition into its offer is that RESPONDENT needed time to prepare its major wine promotion. In case CLAIMANT did not declare its acceptance by 21 June 2006, only about nine weeks would remain for RESPONDENT to find another wine suitable in quality and quantity, at a reasonable price and to arrange for timely delivery. Therefore, a reasonable person can only understand this statement as a resolutory condition for the effectiveness of the offer, not as an arrangement concerning the period up to the 21 June 2006. This merely constitutes a date or period which was intended to indicate that the offer would lapse after that time. Thereby, it is not indicated that the offeror is bound to his offer until the expiry of the period (*Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 9).* Hence, RESPONDENT in its letter of 10 June 2006 merely expressed that its offer would lapse after the 21 June 2006, but did not intend to be bound until this date.

66 This understanding is confirmed by RESPONDENT's legal background which needs to be considered in accordance with Art. 8 CISG. Where the offeror is from a legal system that regards an offer which is made subject to a time-limit as binding, one may assume that the offeror intended his offer to have the effect that the offer is irrevocable *(cf. Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 10)*. However, where the offeror – like RESPONDENT *(cf. P.O. No. 2 at 7)* – is from a common law country, an interpretation of the fact that the offeror introduced a time-limit does not by itself indicate that the offeror intended to be bound for that period according to Art. 8(2) CISG in conjunction with Art. 16(2)(a) CISG, unless there are other indications to that effect *(cf. Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 10, Bianca/Bonell-Eörsi, Art. 16 para. 2.1)*. In the case at hand, there are no other indications. Apart from RESPONDENT's statement in its letter of 10 June 2006 and the circumstances that justify the revocability of the offer, there is no indication whatsoever leading to a different result. Hence, the Arbitral Tribunal should find that the revocability of RESPONDENT's offer was not affected by Art. 16(2)(a) CISG.

b. RESPONDENT's offer was revocable under Art. 16(2)(b) CISG.

67 Furthermore, RESPONDENT's offer was revocable as the requirements of Art. 16(2)(b) CISG are not met. Pursuant to Art. 16(2)(b) CISG an offer can be revoked unless "it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer". In the case at hand, CLAIMANT could not reasonably rely on the offer's irrevocability. On the contrary: since RESPONDENT's offer does not itself sufficiently indicate an intention to be bound *(see supra)*, it cannot induce reasonable reliance on its irrevocability. Thus, Art. 16(2)(b) CISG cannot apply *(cf. Schlechtriem/Schwenzer-Schlechtriem, Art.16 para. 11)*.

68 Irrespective of the above, the second condition of Art. 16(2)(b) CISG is also not satisfied. CLAIMANT did not *act* in reliance on RESPONDENT being bound by its offer. An act performed in reliance on the binding nature of the offer may be indicated by commencing production, acquiring materials, undertaking of costly calculations *(Müko/HGB-Ferrari, Art. 16 para. 22; Honsell-Schnyder/Straub, Art. 16 para. 23; Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 11; Bianca/Bonell-Eörsi, Art. 16 para. 2.2.2; Honnold, Art. 16 para. 144)*. There is no indication that CLAIMANT acted in any of these or similar ways nor that it refrained from any action in reliance on the irrevocability of RESPONDENT's offer. Accordingly, since CLAIMANT did not fulfil the prerequisites of Art. 16(2)(b) CISG RESPONDENT's offer was revocable.

2. RESPONDENT validly declared the revocation of its offer.

69 Revocation of an offer must be made by a declaratory act *(Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 3; Pilz, §3 para. 41)*. By stating "we regretfully inform you that we are withdrawing our offer to purchase 20,000 cases of Blue Hills 2005" in its e-mail of 18 June 2006 (*Cl's Ex. No. 9*), RESPONDENT validly declared the revocation of its offer. RESPONDENT did not use the term "revocation". However, its statement needs to be interpreted in accordance with the understanding of a reasonable person, Art. 8 CISG. The term "withdrawing" of the offer reveals RESPONDENT's intent to terminate any agreement concerning the Blue Hills 2005 deal. Thus, RESPONDENT validly declared the revocation of its offer.

3. The revocation of RESPONDENT's offer was in time.

70 Pursuant to Art. 16(1) CISG "an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." CLAIMANT sent the signed contract to

RESPONDENT in the morning of 19 June 2006 *(St. of Claim at 9)*. Since RESPONDENT's e-mail reached CLAIMANT before the dispatch of the alleged acceptance RESPONDENT revoked its offer in time [**a.**]. Even if the Arbitral Tribunal should find that RESPONDENT's e-mail reached CLAIMANT not earlier than in the afternoon of 19 June 2006, CLAIMANT cannot assert that the revocation did not reach in time [**b.**].

a. RESPONDENT's revocation reached CLAIMANT before the dispatch of the alleged acceptance.

71 Contrary to CLAIMANT's submissions *(cf. Cl's Memo at 69 et seq.)* RESPONDENT's e-mail containing the revocation of its offer reached CLAIMANT on 18 June 2006 [**i.**]. The fact that the 18 June 2006 was a Sunday and might be considered to be outside business hours does not affect the entrance of RESPONDENT's e-mail [**ii.**]. Therefore, RESPONDENT's revocation became effective under Art. 16(1) CISG as it reached CLAIMANT.

i. The revocation of RESPONDENT's offer reached CLAIMANT via e-mail on 18 June 2006.

72 The revocation of an offer becomes effective when it reaches the offeree (*Ferrari/Kieninger/Mankowski/Otte/ Saenger/ Staudinger-Mankowski, Art. 16 para. 8, MüKo/BGB-Gruber, Art. 16 para. 3; Staudinger-Magnus, Art. 16 para.5)*. Art. 15(2)(b) UNCITRAL EC provides that a data message reaches the offeree at the time when it enters an information system of the addressee. Therefore, the notion of "entry" is decisive for the question at which time RESPONDENT's revocation reached CLAIMANT. In accordance with Art. 15(2)(b) UNCITRAL EC, a data message enters an information system at the time when it becomes available for processing within that information system *(UNCITRAL EC Guide, para. 103)*, i.e. an e-mail reaches the addressee when it enters his server *(Huber/Mullis-Mullis, p. 79)*. Hence, RESPONDENT's revocation reached CLAIMANT on 18 June 2006 when its e-mail entered CLAIMANT's server *(cf. St. of Claim at 19)*.

73 The fact that there has been a failure in CLAIMANT's internal network on 18 June 2006 is irrelevant for two reasons. Primarily, access to a central server is regarded as the sphere of risk of the addressee *(cf. Ramberg, Art. 24 in connection with Art. 15, para. 4-6; Honsell-Schnyder/Straub, Art. 24 para. 26)*. Secondly, irrespective of the sphere of risk RESPONDENT's e-mail was in fact "available for processing" in the case at hand. Consequently, RESPONDENT's revocation reached CLAIMANT on the 18 June 2006

before CLAIMANT dispatched its alleged acceptance.

ii. The fact that the revocation reached CLAIMANT on Sunday does not alter its timeliness.

74 The timeliness of RESPONDENT's revocation is not influenced by the fact that the 18 June 2006 was a Sunday. This is supported by the facts of the case and the practices established between the Parties. First, there is no indication that Sunday is not a business day in either of the two countries, Mediterraneo or Equatoriana. But there is strong evidence supporting the contrary. The contract negotiations between the Parties took place on Sundays more than once. On Sunday, 14 May 2006 *(Cl's Ex. No. 1)*, CLAIMANT wrote to RESPONDENT introducing the price and starting to negotiate thereof. On Sunday, 11 June 2006, Ms. Kringle informs RESPONDENT via e-mail that Mr. Cox is absent *(Cl's Ex. No. 6)*. Therefore, the Parties' previous conduct confirms the assumption that business actions take place on Sundays in Mediterraneo and in particular at CLAIMANT's business.

75 Even if the Arbitral Tribunal should find that RESPONDENT's e-mail reached CLAIMANT outside its business hours, this does not lead to a different result. For reasons of legal certainty it is acknowledged in legal writing that as a general rule it does not matter whether the communication reaches the addressee outside his business hours *(Huber/Mullis-Mullis, p. 79; Honsell-Schnyder/Straub, Art. 24 para. 28; Brunner, Art. 24 para. 2; Schlechtriem/Schwenzer-Schlechtriem, Art. 24 para. 14)*. Thus, the revocation reached CLAIMANT in time irrespective of the question whether Sunday is a business day in Mediterraneo or not.

b. Even if the Arbitral Tribunal should find that RESPONDENT's e-mail did not reach CLAIMANT on 18 June 2006, CLAIMANT cannot assert that the revocation was delayed since it would otherwise act contrary to the principle of good faith.

76 Even if the Arbitral Tribunal should find that RESPONDENT's e-mail reached CLAIMANT not earlier than in the afternoon of the 19 June 2006, the revocation of RESPONDENT's offer is still valid. Due to the purpose of Art. 16(1) CISG, in conjunction with the principle of good faith, CLAIMANT cannot assert that it received the revocation of RESPONDENT's offer after it had dispatched its acceptance.

77 The ruling in Art. 16(1) CISG that an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance is supposed to protect the offeree. The

purpose of the "mailbox rule" is to shorten the time of uncertainty for the offeree by permitting the offeree to cut short the time available for revocation *(Honsell-Schnyder/Straub, Art. 16 para. 13; Bianca/Bonell-Eörsi, Art. 16 para. 2.1.2; MüKo/HGB-Ferrari, Art. 16 para. 9; Staudinger-Magnus, Art. 16 para. 7)*. If the time span for revocation lasted until the conclusion of the contract, i.e. when the acceptance reaches the offeror, Art. 18(2) s.1 CISG, the uncertainty on the part of the offeree would last longer. The offeror could revoke his offer until the acceptance reaches him and the offeree could not be sure when this would be *(cf. Bianca/Bonell-Eörsi, Art. 16 para. 2.1.2; MüKo/BGB-Gruber, Art. 16 para. 6; Pilz, §3 para. 43)*. Therefore, Art. 16(1) CISG protects the offeree's reliance on the binding nature and the validity of the offer at the time of the dispatch of his acceptance.

78 In the case at hand, CLAIMANT could no longer reasonably rely on the binding nature and the validity of RESPONDENT's offer in the morning of the 19 June 2006. On the contrary, letting CLAIMANT rely on the precluding effect that a dispatch of its acceptance generally has under Art. 16(1) CISG would ultimately contort the purpose of this provision.

79 CLAIMANT could not reasonably believe in the validity of such a contract closing as it was aware of the reasons that justified RESPONDENT to revoke its offer. On 13 June 2006 an article was published in Mediterraneo Today in which it was stated that anti-freeze fluid had been used in the production of wine in the Blue Hills wine region in Mediterraneo *(Cl's Ex. No. 13)*. Further articles in subsequent editions of the newspaper described the production methods used as a "scandal" *(Cl's Ex. No. 13)*. Already at that time, CLAIMANT knew or could not have been unaware of the fact that RESPONDENT had justified reasons to reconsider the purchase of Blue Hills 2005. By the 18 June 2006 the latest when all of that morning's newspapers in RESPONDENT's domicile, Equatoriana, had also a prominent article about the scandal in the production of wine in Mediterraneo *(Cl's Ex. No. 9)*, CLAIMANT must have anticipated the revocation of RESPONDENT's offer. Though the offeree's knowledge that the offeror intends to revoke its offer does not by itself bring about revocation *(Schlechtriem/Schwenzer-Schlechtriem, Art. 16 para. 3)*, the offeree acts against the principle of good faith when asserting the delay of the offeror's revocation. This rule applies in particular, if the offeree – as in the case at hand – knows very well that the offeror not only has justified reasons to revoke its offer but rather that the whole basis for the contract slipped away. In the case at hand, the material receipt of the revocation was a mere formality, especially since CLAIMANT must have assumed that the revocation might have

been lost in the server due to technical problems on the 18 and 19 June 2006. Therefore, CLAIMANT has to be treated as if it received the revocation of RESPONDENT's offer before the dispatch of its acceptance. CLAIMANT cannot assert the delay of RESPONDENT's e-mail.

3. RESPONDENT's conduct was in observance of the principle of good faith.

80 Contrary to CLAIMANT's allegations *(cf. Cl's Memo. at 76)*, the revocation provided by RESPONDENT on 18 June 2006 was in observance of the principle of good faith. Therefore, CLAIMANT's objection cannot influence the effectiveness of RESPONDENT's conduct.

81 RESPONDENT agrees with CLAIMANT *(cf. Cl's Memo. at 72)* that Art. 7(1) CISG establishes the principle of good faith in international business and trade. This principle implies the prohibition of an abuse of legal rights *(Herber/Czerwenka, Art. 7 para. 6; Enderlein/Maskow/Strohbach, Art. 7 para. 10.1; Honnold, Art. 7 para. 99)*. However, by revoking its offer on 18 June 2006 RESPONDENT did not act in an illegitimate way.

82 CLAIMANT stated that RESPONDENT was aware of the absence of Mr. Cox on 18 June 2006 and therefore knew that its e-mail containing the revocation of its offer would not be read by Mr. Cox prior to the 19 June 2006 *(cf. supra at 80)*. Due to the fact that RESPONDENT nevertheless revoked its offer via e-mail on 18 June 2006, CLAIMANT subsequently concluded that this conduct was not in accordance with the principle of good faith. This, however, is a false conclusion for two reasons.

83 Primarily, in international business between companies, such as Mediterraneo Wine Cooperative and Super Markets S.A., a declaration of intent is considered to be received when it reaches the addressee *(Honnold, Art. 24 para. 179; Staudinger-Magnus, Art. 24 para. 15; Ferrari/Kieninger/Mankowski/Otte/ Saenger/ Staudinger-Mankowski, Art. 24 para. 15)*. In the case at hand, CLAIMANT and RESPONDENT *legally* entered into contract negotiations, whereas Mr. Cox (sales manager for CLAIMANT) and Mr. Wolf (wine buyer for RESPONDENT) *personally* negotiated the details of the contract for their companies as their representatives. If the representative that negotiates a contract for its business, however, is absent from its office, it has to make sure that any statements concerning the possible contract conclusion will be dealt with. In the case at hand, Mr. Cox was absent from his office but made sure, that his e-mails would not be left unattended. The assistant of Mr. Cox, Ms. Kringle, had full access to Mr. Cox's e-mail account *(P.O. No. 2 at 25)*. During the

absence of Mr. Cox, she had already once responded to an e-mail of RESPONDENT *(Cl's Ex. No. 6)*. Therefore, RESPONDENT had justified reason to assume that at least Ms. Kringle as the assistant to Mr. Cox would receive the e-mail. Thus, any allegations that RESPONDENT would have dealt in "bad faith" are flawed. RESPONDENT was perfectly justified in assuming that its e-mail could and would be received.

84 Secondly, it appears that RESPONDENT's legal rights could not be restricted by the absence of Mr. Cox. According to CLAIMANT's allegations, the absence of Mr. Cox precludes RESPONDENT's e-mail to reach CLAIMANT since the personal receipt of the revocation by Mr. Cox was implied. This presumption would enable the offeree to create a factual irrevocability merely by his absence. The offeree could even abuse this possibility in case he deliberately gets on a business trip after receipt of an offer. This, however, would clearly contradict the legal regulations stated in Art. 16(1) CISG.

85 Consequently, RESPONDENT's revocation dated 18 June 2006 was in observance of the principle of good faith.

II. Irrespective of the fact that RESPONDENT revoked its offer on 18 June 2006, there has been no valid acceptance by CLAIMANT on 19 June 2006.

86 Even if the Arbitral Tribunal should find that RESPONDENT did not effectively revoke its offer, a sales contract was not concluded between the Parties. Pursuant to Art. 23 CISG, a contract is considered to be concluded at the moment when an acceptance of an offer becomes effective. The CISG clearly takes the parties' consensus as the basis for the conclusion of a sales contract *(Brunner, Art. 23 para.1)*. Therefore, in case of a dissent between the parties a sales contract could not have been concluded between the Parties.

87 In the case at hand, RESPONDENT offered to purchase a wine which should be of average quality according to the industrial standard. This is supported by the fact that RESPONDENT actually chose a wine which has previously won prizes *(cf. Cl's Ex. No. 1)*. Thus, RESPONDENT assumed that Blue Hills 2005 was not contaminated with any additives. On the contrary, CLAIMANT was fully aware of the fact that Blue Hills 2005 did not constitute a wine of that quality since diethylene glycol has been used as a sweetening agent in its production *(cf. Cl's Ex. No. 13)*. Despite this acknowledgement, CLAIMANT purports to have accepted RESPONDENT's offer on 19 June 2006 *(cf. Cl's Memo. at 65 et seq.)*. Therefore, it appears that CLAIMANT intended to conclude a contract concerning the sale of a wine which is regarded to be of an accustomed quality. However, this intent does

not correspond with the one RESPONDENT clearly stated during the contract negotiations in its offer dated 10 June 2006 *(cf. Cl's Ex. No. 4)*.

88 Consequently, in the present case, there had been no meeting of the minds. Since the CISG, as any other contract law, clearly takes the consensus of the parties as the basic prerequisite for the conclusion of a sales contract, CLAIMANT was not able to accept RESPONDENT's offer on 19 June 2006. Therefore, even if RESPONDENT's offer is assumed to be valid no contract concerning the sale of Blue Hills 2005 was concluded between the Parties.

FIFTH ISSUE: BLUE HILLS 2005 IS NOT FIT FOR THE PARTICULAR PURPOSE MADE KNOWN TO CLAIMANT.

89 Even if the Arbitral Tribunal should find that a sales contract was concluded between the Parties, CLAIMANT's action is still unfounded as Blue Hills 2005 is not fit for the particular purpose made known to CLAIMANT at the time of conclusion of the contract. The particular purpose made known to CLAIMANT was to feature Blue Hills 2005 as the lead wine in RESPONDENT's promotion of quality wines [**A.**]. Blue Hills 2005 does not meet the required standard set by this particular purpose [**B.**].

A. The particular purpose made known to CLAIMANT is to feature Blue Hills 2005 as the lead wine in RESPONDENT's promotion of quality wines.

90 The particular purpose made known to CLAIMANT was to feature Blue Hills 2005 as the lead wine in RESPONDENT's major wine promotion of quality wines that took place in RESPONDENT's super markets during the month of September 2006. To determine how a particular purpose can be introduced into the contractual relationship the CISG provides Art. 35(2)(b) CISG. According to this provision the particular purpose has to be "made known" to the seller. "Making known" does not require a meeting of the minds. It rather suffices for the particular purpose to be brought to the other party's attention which does not have to be in an express manner but can be implied *(LG Regensburg, (Germany 1998); Schlechtriem/Schwenzer-Schlechtriem, Art. 35 para. 21; Bamberger/Roth-Saenger, Art. 35 para. 7; Staudinger-Magnus, Art. 35 para. 27, 39; Enderlein, p. 156)*. A positive acknowledgement of the seller is dispensable as it is sufficient if a reasonable seller could have recognized the particular purpose from the circumstances *(Bamberger/Roth-Saenger, Art. 35 para. 7; Honsell-Karollus, Art. 35 para. 19; Enderlein/Maskow/Strohbach, Art. 35 para. 11; Schlechtriem/Schwenzer-Schlechtriem, Art. 35 para. 21; Staudinger-Magnus, Art. 35 para. 28)*. The particular purpose must be made known to the seller at the time of the

conclusion of the contract. Subsequent notification is insufficient *(Enderlein, p. 156; Schlechtriem/Schwenzer-Schlechtriem, Art. 35 para. 22; cf. Ferrari/Kieninger/Mankowski/Otte/Saenger/Staudinger-Ferrari, Art. 35 para. 18)*. Taking these prerequisites into consideration, RESPONDENT expressly as well as impliedly made known to CLAIMANT that Blue Hills 2005 was to be featured as the lead wine in its September wine promotion.

91 Already at the Durhan wine fair in May 2006 CLAIMANT came to know that RESPONDENT had plans to mount a major wine promotion. RESPONDENT's buying team was exclusively looking for wines not previously marketed in Equatoriana and for this reason had a particular interest in Blue Hills 2005 *(St. of Claim at 5; Cl's Ex. No. 1)*. It was clear to CLAIMANT from the very beginning that RESPONDENT not only intended to buy Blue Hills 2005, but to "feature" the wine it its wine promotion.

92 Moreover, CLAIMANT was aware of the fact that Blue Hills 2005 had to be a "quality wine" in order to be featured in RESPONDENT's wine promotion. In its letter of 14 May 2006 CLAIMANT acknowledged that RESPONDENT intended to feature only quality wines in its promotion by noticing that Blue Hills 2005 is an "outstanding choice for a promotion of quality wines" *(Cl's Ex. No. 1)*. This acknowledgement shows that RESPONDENT must have already made it clear to CLAIMANT at the fair that it was only going to feature quality wines. Thus, CLAIMANT even positively acknowledged this particular purpose when it started contract negotiations with RESPONDENT.

93 This is supported by the fact that RESPONDENT reiterated this purpose in its letter of 10 June 2006 when it 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)*. Therefore, by inversing this statement, RESPONDENT re-emphasized that in order to be the featured item in the wine promotion, Blue Hills 2005 had to be a quality wine.

94 RESPONDENT also made known to CLAIMANT that Blue Hills 2005 was supposed to take the lead in its promotion. In its reply to CLAIMANT's letter of 14 May 2006, RESPONDENT stated that Blue Hills 2005 "has just the right character to take the lead in the promotion" *(Cl's Ex. No. 2)*. This was also positively acknowledged by CLAIMANT in its letter of 1 June 2006 as it stated that RESPONDENT was "making a wise choice in choosing Blue Hills 2005 as the lead wine in [its] promotion" since this is an "exceptionally fine wine, that will certainly satisfy all of your customers" *(Cl's Ex. No. 3)*. Thereby, CLAIMANT even assured RESPONDENT that Blue Hills 2005 were fit for the purpose

made known.

95 Consequently, the particular purpose – to feature Blue Hills 2005 as the lead wine in RESPONDENT's promotion of quality wines – was not only impliedly made known to CLAIMANT but also explicitly. The fact that CLAIMANT acknowledged this purpose provides grounds on which even a contractual agreement appears reasonable.

B. Blue Hills 2005 is not fit for the particular purpose made known to CLAIMANT.

96 Opposing CLAIMANT's assurance, Blue Hills 2005 is not fit for the particular purpose made known to CLAIMANT. A seller who assures its customer that the offered goods can be used for a particular purpose commits a breach of contract pursuant to Art. 35(2)(b) CISG through a subsequent delivery of goods not suitable for this purpose *(Manipulados del Papel v. Sugem Europa (Spain 1997))*. Thus, by delivering the wine CLAIMANT would commit a breach of contract as Blue Hills 2005 cannot be used for the particular purpose made known. Blue Hills 2005 is not suitable to be used in a promotion of quality wines [**I.**]. Its reputation also disqualifies the wine from being suitable for the particular purpose [**II.**]. CLAIMANT cannot argue that RESPONDENT is precluded from asserting that Blue Hills 2005 lacks fitness for the particular purpose as consequence of the principle of good faith [**III.**].

I. Blue Hills 2005 is not suitable to be used in a promotion of quality wines.

97 To be suitable for RESPONDENT's promotion of quality wines Blue Hills 2005 needs to be a quality wine [**1.**]. Blue Hills 2005 does not have the quality required [**2.**].

1. Blue Hills 2005 needs to be a quality wine.

98 The particular purpose made known to CLAIMANT calls for the promotion of quality wines. When RESPONDENT addressed the particular purpose, it did so on the assumption that Blue Hills 2005 fulfils this quality. When doing so RESPONDENT established that in order to fit the particular purpose, a wine would need to have the quality which was adjudged to Blue Hills 2005 by RESPONDENT. This is what CLAIMANT understood, which is confirmed by his letter of 1 June 2006 *(Cl's Ex. No. 3)*. Any possible assertion by CLAIMANT that it did not understand that particular intent is irrelevant, as an objective person in CLAIMANT's situation would have done so. This perspective of an objective person is not only relevant for the fact that the wine had to have a certain quality at all but also for the determination of that degree of quality.

99 As a consequence the wine delivered needs to possess the qualities, that RESPONDENT

reasonably attributed to it. The relevant attributes are primarily determined by RESPONDENT's expertise as a large operator of super markets with about 2,000 outlets *(St. of Claim at 4)* and the largest retailer of wine in Equatoriana *(St. of Claim at 4)*. This knowledge does extend to the fundamental information of Mediterraneo as a wine producing country and Blue Hill's wine producing record.

100 Reasonably RESPONDENT could expect Blue Hills 2005 to be produced as it was all the years before. CLAIMANT's own expert Prof. Ericson acknowledges that both, the records and the chemical analysis of the production process of Blue Hills indicate that no sweetening agents had ever been used in any preceding vintage year other than that of 2005.

101 As the exclusion of endorsements and artificial or chemical supplements in particular is a generally acknowledged key criteria for the determination of any wine's quality, the wine delivered to RESPONDENT cannot fulfil the particular purpose unless it is free of any such contamination.

2. Blue Hills 2005 does not have the quality required.

102 Blue Hills 2005 is not of the quality required to fit the particular purpose made known to CLAIMANT. Blue Hills 2005 contained diethylene glycol. Diethylene glycol is a chemical substance commonly used as an anti-freeze substance. Comparable substances, that are also applied as anti freeze agents are usually used in the automobile industry which is a purpose which is not even remotely related to the production of edible and potable products. On the contrary, it is furthermore used as a solvent in resins, dyes, oils and can also be found in hydraulic fluids and brake fluids.

103 According Prof. Ericson's report, it is common to use cane or beet sugar as a sweetening agent, in these cases to bring the must to a proper level for fermentation and therefore intervene in the natural process by artificially improving the quality of the wine. CLAIMANT however chose not to apply sweetening agents that are sometimes used in the vine producing industry but rather decided to use an artificial and chemical substance. Not only did CLAIMANT use a chemical substance, but one which is poisonous and even lethal when consumed in certain amounts, as can be derived from Prof. Ericson's expert opinion.

104 CLAIMANT's assertion that the wine would have to be consumed in huge amounts for the diethylene glycol to be lethal is both cynical and irrelevant. With regard to the quality standard outlined beforehand it is not the amount of the potentially lethal agent induced into the wine that matters, but only the fact that it was include at all.

105 In view of these facts CLAIMANT's allegation that the wine "has not been adulterated in any way" can only be rated as misleading or even malicious intent *(Cl's Ex. No. 12)*. Prior to 2005 CLAIMANT seems to have been able to produce wine without the use of sweetening agents. In previous years, CLAIMANT profited from a good climate and even won prizes with its quality wines, including Blue Hills *(Cl's Ex. No.1)*. When blending Blue Hills 2005 with diethylene glycol in order to create the taste of former vintages CLAIMANT adulterated the wine making it unable to fulfil the particular purpose made known.

II. Due to the bad reputation of Blue Hills 2005, it is not fit for the particular purpose.

106 Blue Hills 2005 has a tremendously bad reputation for obvious reasons. This is due to the fact that it is being adulterated with a toxic substance, which is supposed to be used as anti-freeze. The particular purpose is to be featured in a promotion of quality wines. As shown above, Blue Hills 2005 can by no means be considered to be a quality wine. Additionally, Blue Hills cannot be considered to be of a common average quality, since it is not common to adulterate wine with anti-freeze fluids. It is therefore not surprising that the press in both countries reports on the scandal. These facts exclude Blue Hills 2005 from being fit for promotion purposes due to a bad reputation [**1.**]. Blue Hills 2005 is also no longer saleable in Equatoriana, which definitely was included by the particular purpose made known to CLAIMANT [**2.**].

1. Blue Hills is not fit for the particular purpose due to its bad reputation.

107 Blue Hills' bad publicity due to the use of diethylene glycol disqualifies the wine from being featured in RESPONDENT's wine promotion.

108 As already shown above, being a featured wine in a promotion implies that the wine is suited to draw the attention to the other goods so as to support their sale. This is why RESPONDENT has noted that "with the bad publicity that wine from the Blue Hills region has received […] it no longer has the qualities necessary to be an "outstanding choice for a promotion of quality wines" *(Cl`s Ex. No. 11)*.

109 Even if one could not expect Blue Hills 2005 to have an outstanding reputation in Equatoriana, one could at least expect the wine not to have such a bad reputation. Customers obviously will not be attracted by a wine that contains toxic additives. Whether the wine is in fact a health risk or not is irrelevant since, for the purpose of a promotion, solely the customer perception matters.

110 Therefore, due to the bad reputation of Blue Hills 2005 created by newspaper articles in Equatoriana, Blue Hills 2005 is not suitable to be featured in a promotion of quality wines, not to speak of it being the "lead" wine of promotion. Thus, the particular purpose made known by RESPONDENT cannot be satisfied.

2. Blue Hills 2005 is not fit for the particular purpose as it is not saleable in Equatoriana.

111 Blue Hills 2005 is not fit for the particular purpose as it is not saleable in Equatoriana. It is obvious that RESPONDENT wanted to sell the wine to its customers. This is evidenced by the fact that the purchase order expressly states that the final delivery of 2,500 cases "is contingent upon a minimum of 12,000 cases **having been sold** by 25 September 2006" *(emphasis added) (Cl`s Ex. No. 5)*.

112 RESPONDENT acknowledges that the saleability of Blue Hills 2005 is not constricted by law *(P.O. No.2, §11)*. However, Blue Hills 2005 is not saleable under commercial aspects.

113 The newspaper articles made it widely known in Equatoriana that Blue Hills 2005 contains diethylene glycol. As mentioned above, customers will not be likely to buy a wine that contains toxic additives. The fact that Blue Hills 2005 was sold in Mediterraneo does not imply that the same will be true for other markets. In fact, due to the reasons given above, it is to be expected that Blue Hills 2005 will not be saleable in Equatoriana. Any assertion of CLAIMANT to the contrary would be without merits, as RESPONDENT – not CLAIMANT *(Cl's Ex. No. 8)* – is an expert in selling wine in Equatoriana, being the largest wine retailer in the country (*St. of Cl.,§ 4*).

Thus, Blue Hills 2005 cannot be expected to be saleable on the Equatorian market. Therefore, it is not fit for the particular purpose made known to CLAIMANT.

III. RESPONDENT is not precluded from asserting that Blue Hills 2005 lacks conformity.

114 CLAIMANT cannot argue that RESPONDENT is precluded from asserting that Blue Hills 2005 lacks conformity. Though it can be derived from Art. 35(3) CISG that the buyer acts against the principle of good faith by holding the seller liable for any lack of conformity of the goods if the buyer knew of such lack of conformity at the time of the contract closing. However, this exemption of the seller expresses the principle of venire contra factum proprium and therefore requires contradictory behaviour on the part of the buyer. The seller should be protected only if the buyer acts in bad faith by claiming the seller's responsibility

for defects he recognized and thereby assumedly accepted. This is not the case here.

115 On the contrary, when RESPONDENT came to know by the newspaper articles that Blue Hills 2005 was contaminated it instantaneously attempted everything within its power to prevent the sales contract from coming into effect. Since RESPONDENT was aware of the fact that Mr. Cox was absent the only certain possibility left was to revoke the offer via email. Further, RESPONDENT knew from former correspondence that Mr. Cox's assistant Ms. Kringle had access to Mr. Cox's e-mail account in case of his absence. Therefore, sending an e-mail to CLAIMANT was the most effective way to declare the revocation from RESPONDENT's perspective at that time. As a consequence of RESPONDENT's reasonable action CLAIMANT was well aware that RESPONDENT no longer wished to enter into contractual relations at the time of the conclusion of the contract (21 June 2006). RESPONDENT never acted contradictorily in regard to the fitness of the goods. Therefore, RESPONDENT is not precluded from asserting the non-conformity of Blue Hills 2005 for the particular purpose made known.

REQUEST FOR RELIEF

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

- The Parties never concluded a valid arbitration agreement **[First Issue]**.
- The Arbitral Tribunal should grant a stay of the arbitral **[Second Issue]**.
- In case Art. 17(3) JAMS Rules was violated the Tribunal should not draw any adverse consequences **[Third Issue]**.
- A sales contract was never concluded between CLAIMANT and RESPONDENT **[Fourth Issue]**.
- Blue Hills 2005 is not fit for the particular purpose made to CLAIMANT **[Fifth Issue]**.

For Equatoriana Super Markets S.A.

(signed) _____, 17 January 2008

ATTORNEYS

Stefanie Green	Kai Mathar	Thorsten Salomon	Julia Strerath