Twelfth Annual Willem C. Vis International Commercial Arbitration Moot
2004-2005

MEMORANDUM FOR CLAIMANT

Dr. Ambedkar Govt. Law College

Raja Pannir Selvam	Vinu Peter Immanuel	BadriNarayanan. K
R. Lakshmi. Ratan	Jagannathan. B	Kumarpal chopra

Twelfth Annual

Willem C. Vis

International

Commercial Arbitration Moot

Vienna, Austria

2004-2005

Dr. Ambedkar Govt. Law College

Chennai – 600104

INDIA

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Moot Case No.: 30000-2004

Between

Mediterraneo Confectionary Inc., ***Claimant***

121, Sweet Street,

Capitol City,

Mediterraneo

Phone : (0)555-1235

Fax : (0)555-1237

And

Equatoriana Commodity Exporters, S.A., ***Respondent***

325, Commodities Avenue,

Port City,

Equatoriana

Phone : (0)487-2314

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MEMORANDUM FOR CLAIMANT

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LIST OF ABBREVIATIONS

AG Amtsgericht (German Petty District Court)

AISCC Arbitration Institute of the Stockholm Chamber of Commerce

Art. Article

Artt. Articles

BGH Bundesgerichtshof (German Federal Supreme Court)

BGHZ Sammlung von Entscheidungen des Bundesgerichtshofs in Zivilsachen (Official Reporter of cases decided by the German Federal Supreme Court)

CA Cour d'appel (French Appeal Court)

CCIB Chamber of Commerce and Industry of Budapest

cf. compare (conferatur)

CISG United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980

ed. edited

e.g. for example (exempli gratia)

FOB Free On Board (INCOTERM)

HG Handelsgericht (Swiss Commercial Court)

Ibid. in the same place (ibidem)

i.e. that means (id est)

ICARFCCI Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

ICC International Chamber of Commerce

ICSID International Center for Settlement of Investment Disputes

INCOTERM Incoterms 2000, International Commercial Terms of the ICC

LCIA London Court of International Arbitration

LG Landgericht (German Regional Court)

Ltd. Limited

MCC Danish Maritime Commercial Court

Model Law UNCITRAL Model Law on International Commercial Arbitration 1985

NAI Netherlands Arbitration Institute

New York Convention United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958

n. note

No. Number

Nos. Numbers

OG Obergericht (Suisse Appellate Court)

OGH Oberster Gerichtshof (Austrian Supreme Court)

OLG Oberlandesgericht (German Regional Court of Appeal)

O R. Official Records

p. page

pp. pages

para. Paragraph

S.D.N.Y United States District Court, Southern District of New York

et seq. the following (sequential)

UNCITRAL United Nations Commission on International Trade Law

UNCITRAL Model Law UNCITRAL Model Law on International Commercial Arbitration

of 21 June 1985

v. versus

Y.B. UNCITRAL Yearbook

STATEMENT OF FACTS

CONCERNING COCOA CONTRACT.

19 November 2001	**Respondent conversed with the Claimant** over telephone to sell 400 tons to Cocoa to Claimant.
19 November 2001	**Parties enter into Contract** through Fax confirming the telephonic conservation. Contract includes price, shipment, payment terms, choice of law, and arbitration provisions.
24 February 2002	**Respondent informs Claimant** regarding ban on export of cocoa by the Governing Authority in the Respondent's State due to storm.
5 March 2002	**Claimant informs Respondent** that it is not necessary to supply Cocoa only from Respondents State and that the Claimant need to buy Cocoa elsewhere if the Respondent fails to deliver and be liable for additional costs.
10 April 2002	**Claimant enquires Respondent** as to when the Cocoa will be delivered to the Claimant.
7 May 2002	**Respondents sends a fax to Claimant** informing that 100 tons of Cocoa will be shipped later that month.
28 May 2002	**Respondent ships Claimant,** 100 tons of Cocoa and receives payment for 100 tons of Cocoa.
15 August 2002	**Claimant informs Respondent** that if the Respondent fails to deliver the remaining Cocoa soon, the Claimant will be forced to buy them elsewhere, making the Respondent liable for the additional costs.
24 October 2002	**Claimant purchased 300 tons** of Cocoa from Oceana Produce Ltd. at the then Current Market Price.
25 October 2002	**Claimant informs Respondent**, the purchase and claims for the cost exceeding the contracted cost.
11 November 2002	**Claimant sends Respondent**, a copy of the Oceana contract for Cocoa and demands to pay the extra expense.

13 November 2002	**Respondent denies to oblige** to the demand and states that the Claimant has breached the contract by buying the Cocoa from elsewhere.
15 November 2002	Claimant informs Respondent that the referred **contract was terminated** well before the purchase.
5 July 2004	Claimant files against the Respondent the **Notice of arbitration.**
6 July 2004	CCIG acknowledges and requests for the **arbitration fees**
12 July 2004	**Claimant transfers** to the account of CCIG, the mentioned amount of fees.
16 July 2004	**CCIG acknowledges Respondent**, the payment of fees, and requests the parties to respond within 30 days regarding the arbitral tribunal.
21 July 2004	Claimant informs CCIG, their desire to have a **three-member arbitral tribunal.**
10 August 2004	Respondent informs CCIG of the payment and **accepts the constitution** of a three member arbitral tribunal and files **answer and counter claim.**
13 August 2004	CCIG acknowledges the notice of arbitration and counterclaim by the Respondent and requests the parties to designate the co-arbitrators and informs the Respondents that the Jurisdiction over Counterclaim would be under the discretion of the arbitral tribunal.
31 August 2004	Claimant files **answer to counterclaim** and designates Dr. Claimant Arbitrator to serve as co-arbitrator. Respondent designates Mr.Respondent Arbitrator to serve as co-arbitrator.
3 September 2004	CCIG informs Dr.Claimant Arbitrator and Mr. Respondent Arbitrator their appointment as co-arbitrators and requests for confirmation for the same.
6 September 2004	Dr. Claimant Arbitrator and Mr. Respondent Arbitrator

	accepts their appointment as co-arbitrators.
13 September 2004	CCIG acknowledges co-arbitrators their confirmation and invites them to designate the presiding arbitrator.
16 September 2004	Dr. Claimant Arbitrator informs CCIG that himself and Mr. Respondent Arbitrator have agreed to designate Professor Presiding Arbitrator as the presiding arbitrator.
22 September 2004	CCIG informs Professor Presiding Arbitrator, Dr. Claimant Arbitrator and Respondent Arbitrator, the confirmation of Professor Presiding Arbitrator to serve as the Chairman of the arbitral tribunal and acknowledges the statement of independence from him.
1 October 2004	The President of the arbitral tribunal from Swiss Chambers Arbitration issues Procedural Order No 1.

CONCERNING SUGAR CONTRACT.

20 November 2003	**Respondent contracts to sell 2500 tons** of sugar to the Claimant.
4 December 2003	Contract was made to make Oceania Shipping Lines, the carrier.
8 December 2003	The sugar was loaded in Oceania Condor by the Respondent.
15 December 2003	The shipment of contracted **sugar was received** by the claimant.
19 December 2003	The claimant informs Respondent that the received **sugar appears to be fouled** prior to loading into the containers and could not be used for human consumption.

ARGUMENTS

ISSUE – 1

Whether The Tribunal has Jurisdiction to hear the Counter Claim brought by t he Respondent?

The Jurisdiction of the Tribunal to hear the dispute out of the cocoa contract is not in contention.

Mediterraneo Confectionary Associates, Inc. is a producer of various confectionary items (henceforth referred to as the Claimant). Equatoriana Confectionary Associates, S.A., is a trader of commodities, including cocoa (henceforth referred to as the Respondent). On 19 November 2001 Mr. Harold Smart, account executive for Equatoriana Commodity Exporters, S.A., telephoned Mr. James Sweet, commodity buyer for Mediterraneo Confectionary Associates, Inc., and offered to sell cocoa.

The two companies have done business together on a number of occasions over the years. At the end of the telephone conversation it was agreed that Equatoriana Commodity Exporters, S.A. would sell 400 metric tons of cocoa beans to Mediterraneo Confectionary Associates, Inc. During the period January-February 2002 Equatoriana Commodity Exporters, S.A. was to fix a delivery date that would be between the months of March to May 2002. The price was set at the current market price on 19 November 2001 of USD .5628 per pound, which was equivalent to USD 1,240.75 per metric ton. (One metric ton equals 2204.6 pounds.) The total contract price for the 400 metric tons was USD 496,299.55. Exhibit 2 is the contract for the sale of coca (henceforth referred to as the coca contract).

In the coca contract both the parties agreed to an Arbitration clause "Any disputes arising with respect to or in connection with this agreement shall be finally decided by three arbitrators in accordance with the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva. The arbitration shall take place in Vindobona, Danubia and shall be

in English." Hence the tribunal has jurisdiction in deciding the dispute concerning the cocoa contract. The Respondent, for reasons unknown, did not perform their duty according to the contract. This lead to lot of hardships on part of the Claimant. Thereby approaching this tribunal for a relief. It is nowhere stated by either the Claimant or the Respondent, that the validity of Tribunal is a matter of contention. Both the parties to the dispute have agreed to bind by the rules and procedures laid down. Therefore in regard to the existence, composition or functioning of this Arbitral Tribunal is not in dispute.

This Tribunal does not have the jurisdiction to hear the dispute risen out of the sugar contract. Since, the Parties have agreed for Arbitration by another specialized Institution.

On 20 November 2003 The Respondent sold 2,500 metric tons of sugar to The Claimant. (Respondent's Exhibit No. 4) The price was USD 0.07 per pound or USD 154.32 per metric ton, for a total contract price of USD 385,805. The contract was FOB (Incoterms 2000) Port Hope, Oceania. Delivery to the carrier, Oceania Shipping Lines was made in conformity with the contract on 4 December 2003.

The Sugar Contact 2212 contained an arbitration clause calling for arbitration by three Arbitrators in accordance with the Rules of Arbitration of the Oceania Commodity Association. As there exists a separate agreement clause for the purpose of Arbitration, this Tribunal does not have the jurisdiction. In it both the parties have agreed to Arbitration under Oceania Commodity Association, a specialized Dispute Resolution Forum. Both the parties chose it unanimously while contracting. There were no objections raised, nor were any apprehensions as to it.

The theory of party autonomy (autonomie de la volonte) is actually the most difficult concept in private international law (Niboyet, "La theorie de l'autonomie de la volonte, 16 Rec. des Cours (1927 – I), at p.5). The definition given by Niboyet in that 1927study still holds good. He says, "One understands generally by party autonomy, the power of the parties to choose the law applicable in contractual matters."(Ibid)

Under the Doctrine of party autonomy, the parties are free to select for themselves the law to govern their relations. Where a conflict of laws embraces the laws it recognizes 'the power of the parties to determine for themselves for determining the applicable law', (Ibid at p.7) rather than impose upon the parties a law which following the connecting factors of that system of conflict of laws, is deemed applicable to govern an international contract. This to prefer a law subjectively ascertained by the parties themselves in each case, to a law objectively determined for the type of case in question.

Autonomy is thus accompanied by an initial removal of the responsibility from the Judge or Arbitrator to the parties. "The law applicable to the contract is determined by the Judge but by reason of the will of the parties as regards the localisation of the contract (Batifool – Lagarde, Traite, tome II, para 571)". So a contract with connections to more than one legal system will be governed by paima facie by "the law which the parties have chosen"(American Trading Co. Vs Quebec Steamship Co. (S. 1911 - 1 - 129). Within the principal contract, the choice of law provision (Comparative Conflicts, Vol. II 2nd Edition p. 369) becomes a contract per se, subsidiary (Ibid. Rabel termed this to as auxiliary to the main contract) to, though independent to the main contract (Le domaine de la loi du contract en droit international prive (Dalloz, Paris 1972)). The effect of the doctrine of autonomy is to concede to the parties the power to determine the potent of the law over the contract (Ibid).

Party autonomy enables the parties to be certain as to which law will applied to the contract, the effect and the interpretation of the contract becomes predictable, and in turn ensures an uniform solution to the particular dispute, whatever the nature of the tribunal, wherever it may be situated and whoever the judges. As Rabel wrote:

"Autonomy . . . endeavors to obviate the unpredictable findings of unforeseeable tribunals and to consolidate the contract under one law while negotiation is in course."(Lando, "The Proper Law of Contracts", 8 Scandinavian Studies in Law 107 (1964) p.145).

Furthermore, recognizing the right to choose the applicable law provides contracting parties with the mechanism by which to avoid the contract being regulated by an unambiguous, or unfavourable law, or being given an undesirable effect. The effect given to the contract and the ensuant rights and duties of the parties are therefore due entirely to the expressed will of the parties.

Specialized Arbitrations facilities have an advantage of deciding over issues pertaining to quality of products.

Commodity exchanges and many trade associations have an associated arbitration facility for disputes arising in the particular exchange or trade. Those arbitration facilities would be subject to the same arbitration law as any other arbitration facility in the same country. They would have their own rules and arbitrators would almost always come from the members of the exchange or participants in the trade concerned.

The use of the associated arbitration facility is required for exchange traded contracts under the rules of commodity exchanges such as the New York Board of Trade and LIFFE and for contracts between members of many trade associations. Specialized arbitration facilities are particularly useful when the dispute is in regard to the quality of the commodities delivered or where specialized practices in the trade are concerned. Where the dispute involves general questions of law or trade practices, specialized arbitration facilities have no particular advantage over arbitration institutions for international commercial arbitration in general.

Of course, where the parties have a choice of arbitration institution, the choice is normally made in the underlying contract at the time of sale and not later when the nature of the dispute is known. The two parties in this case do not belong to any association that would require arbitration in any particular arbitration institution. Cocoa and sugar are the only two commodities sold by Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc. and all the contracts had the same arbitration clauses as found in the two contracts in question.

By the sugar contract 2212 both the parties had agreed to Arbitration under Oceania Commodity Association, following the rules laid down under it. As dealt with above specialized Arbitration facilities have considerable advantages over others when the dispute involves the quality of goods. This was the very reason why both the parties had agreed to this Institution. And as discussed, party autonomy must be respected and given its sanction.

The parties while contracting had agreed to abide by the Geneva Rules, which had no provision for bringing in a Counter Claim or a set – off defence.

Swiss Rules were brought in to harmonize and unify the existing Rules of six different Chambers in Switzerland. It came into force from the 1st of January 2004.

In the past, six Chambers of Commerce and Industry in Switzerland had their own different rules of arbitration for the resolution of international commercial disputes. In order to promote institutional arbitration in Switzerland and to harmonise the existing rules of arbitration, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich have adopted the present uniform rules, the Swiss Rules of International Arbitration, which replace the Chambers' former rules of international arbitration. (Swiss Rules of International Arbitration, July 2004)

The newly enacted Swiss rules apply to disputes concerning parties of international character. Though the respective rules of the six chambers, continue to apply for domestic arbitrations. It can be understood from the object clause of the Swiss rules that the main purpose of enacting a new set of rules, is to amalgamate the present rules of six commerce of industry in Switzerland.

Therefore the Claimant had agreed to by bound by the Swiss Rules in principle. All procedures relating to this Arbitration were followed in accordance with it.

While contracting both the parties to the contract had agreed to abide by the Geneva Rules of Arbitration. But a collective decision was taken, so as to replace it with the

Swiss Rules, which came into force from 1st January 2004. As it may be clear, there was no express clause in the contract or in any subsequent conversations, regarding the Swiss Rules. But, taking into account the present changes, the Claimant agreed to abide by the Swiss Rules in principle. And never submitted itself completely to it, or was any agreement reached on that issue, with the Respondent.

As a result, all communications to the Chamber, appointment of Arbitrators, payment of Arbitral fees and all other modes of administrative communications were made, following the procedures laid own in the Swiss Rules. Once again to reiterate, neither of the parties have expressly agreed to completely abide by the Swiss rules, which is not envisaged as per their contract.

All that the Claimant had agreed is to abide by the Swiss Rules in administrative and procedural issues and not in Toto. Even if the provisions of the Swiss Rules were to taken as to be binding, provisions that are completely contrary to that of the Geneva Rules, will not be binding.

ISSUE – 2

Whether the act of timely non-delivery of goods had constituted a fundamental breach of contract by the Respondent?

Respondent is liable for the unwarranted delay.

The Contract did not specify for Equatoriana cocoa in particular.

Neither in the Cocoa Contract 1045 nor in any subsequent conversations did the Claimant stress on Cocoa from the land of Equatoriana. All that the Claimant wanted according to the Contract is Cocoa of standard Grade and Count (Claimant's Exhibit No.2). In the letter dated 24th February 2002, the Respondent had indicated that a storm that had hit their country, especially the cocoa producing regions. And thereby informing the Claimant upon the embargo imposed on them to export cocoa, by their Government.

In reply to this, the Claimant, by the letter dated 5th March 2002, had stressed that they were not interested only in Equatoriana cocoa, and the source was completely irrelevant. Further stressing that, all the Claimant expects is timely delivery.

The Respondent had said that it must be presumed by the Claimant, so as to the name 'Equatoriana Commodity Exporters, S.A.' that it deals with goods produced in Equatoriana alone (Respondent's Statement of Defence). But considering the fact that sugar supplied by the Respondent to the Claimant, by virtue of the sugar contract 2212, came from a source other than Equatoriana (Respondent's Exhibit No.4). It is not appreciative to bring in such types of vague and uncharacteristic defences. Being an international exporter, trading with clients in different parts of the globe, needs to take the extra step of caution and responsibility in delivering the goods and honouring commitments.

Performance may be so late that the aggrieved party cannot use it for its intended purpose, or the behavior of the non-performing party may in other respects be such that

the aggrieved party should be permitted to terminate the contract. The respondent in the said case has delayed shipment off the cocoa for an unreasonable period of time. As agreed in the contract the respondent was agreed to deliver the cocoa by May, but he did do the same. There where many communications between Mr. Sweet and Mr. Smart where it was informed time and again that the cocoa should be derived in time. The delay in delivery of cocoa amounts to fundamental breach of contract. It is common knowledge that the Claimant is a manufacturer of confectionaries, and was heavily dependent on the Respondent for supply of additional cocoa.

Further more the Respondent had said that time was not an essential factor (Answer to Claim). But it was not so, as a time frame was clearly outlined in the Cocoa contract 1045. Therefore it was necessary, on part of the Respondent to bind by them.

<u>There was no obstacle for Equatoriana in supplying the cocoa.</u>

After the occurrence of the storm on 14th February 2002, the Government of Equatoriana had curbed the export of cocoa. This was cited by the Respondent, as an excuse in timely non – delivery of cocoa.

The following is an illustration given under the UNIDROIT regarding Art 7.3.1,
'A, a company located in country X, buys wine from B in country Y. The Government of country X subsequently imposes an embargo upon the import of agricultural products from country Y. Although the impediment cannot be attributed to A, B may terminate the contract'.

It is very clear from the above provision that, one cannot hide behind the excuse of Governmental ban. The ban has not barred the Respondent from honouring his duties.

Fundamental Breach committed by the seller.

No timely delivery of goods.

'Fundamental breach' is defined by Art 25 in the following terms:

> "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

The test for fundamental breach most frequently used is that of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (*[*1962] 2 QB 26 at 66). The concept of fundamental breach is central both to avoidance (by either party) and to rejection.

In the present case, the act of non – delivery by the Respondent had caused great financial hardship to the Claimant. The breach was substantial and detrimental, so as the Claimant to suffer a loss of US$ 289,353. Which is a huge sum, even more one considers the fact that, the Claimant is a small-scale producer. And it was clearly foreseeable by the Respondent on the likely shortcomings the Claimant might face, on non-delivery of goods. Repudiation involves conduct on the part of one party to the contract which when viewed objectively is such "as to convey to a reasonable person in the situation of the other party repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it". (See Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 per Deane and Dawson JJ.)

According to Art 33, the seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;
(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
(c) in any other case, within a reasonable time after the conclusion of the contract.

It was clearly spicified in (Claimant's Exhibit No 2) that the delivery of the cocoa should have been between March and May, and that the fixing of the delivery date of the cocoa should have been specified between January and February. Even in the letter from Mr. Sweet to Mr. Smart no the 5th of March (Claimant's Exhibit No 4) that the contract did not specify that it should be Equatoriana and that the source of the cocoa was irrelevant to the claimant. In the letter dated 10th April (Claimant's exhibit No 5) From Mr. Sweet to Mr. Smart it was again stressed that the delivery be between before the end of May. Even though the claimant has made his concern very clear of the failure to fix a delivery date there has been no response from the Respondent. The delay in timely delivery of goods is in itself a fundamental breach of the contract. (Helsinki Court of First Instance (Judgment 28966, civil dispute 97/20514)).

Undue hardships caused thereby.

By not delivering the cocoa the respondent have caused undue harm to the claimant. The claimant produces confectionaries. And cocoa is an integral part of there produce. By entering into the contract the claimant was under the impression that they had the secured the necessary amount of cocoa needed by them. By not delivering the cocoa in them the respondent caused the cocoa in the reserves of the claimant to go low. The claimant repeatedly informed the respondent of the depleted resources of cocoa they where facing and asked for timely delivery. The contract was for coca and not cocoa from Equatoriana. Thus by not delivering the cocoa in time the respondent has caused the claimant great hardship. If the seller does not employ that right or it causes the buyer unreasonable nuisance or expenses, the buyer alternatively has the right to avoid the contract based on fundamental breach. (In a Finnish case)

ISSUE – 3

Whether the Claimant is justified in avoiding the Contract?

Claimant is justified in avoiding the Contract.

Fundamental Breach on part of the Respondent.

Avoidance is a process through which an aggrieved party, by notice to the other side, terminates the contractual obligations of the parties. (Harry M. Flechtner, 8th Journal of Law and Commerce (1988); pp. 53-108.)

The CISG contains four articles on the effects of avoidance. The general rule is found in Art. 81, while Arts. 82, 83, and 84 specify the concrete duties of the seller and buyer in cases of avoidance of contract. Under the UNIDROIT Principles, two articles are related: Art. 7.3.5 prescribing the Effects of Termination in General; and Art. 7.3.6 dealing with Restitution. And under the PECL, Arts. 9:305 to 9:309 govern the nature and effect of termination under the European Principles.

According to CISG Art. 81(1), the fact that a party has resorted to the avoidance remedy does not deprive it of its right to claim damages that may be due under the Convention (pursuant to Arts. 74, 75, and 76) or the contract. Indeed, CISG Arts. 45 and 61 have already made it clear that claims for damages can be asserted apart from other legal consequences of breaches of contract, thus also apart from avoidance.

Although avoidance of the contract relieves the parties from their contractual obligations, this does not mean that every clause of the avoided contract ceases to be effective or that all the rights and obligations provided for in the contract automatically come to an end. (John O. Honnold in "On the Road to Unification of the Law of Sales") Generally speaking, dispute resolution clauses always remain binding after the contract ceases to exist by way of avoidance or automatic termination. Supra. note 25, p. 34.

There are two grounds for avoidance under the CISG:

1. A breach amounting to a 'fundamental breach'; (Governed Arts 49(1)(a), 51(2), 64(1)(a), 72) and
2. Failure by a seller to deliver pursuant within an additional period of time fixed under Art 47 or failure by a buyer to pay the price or take delivery of the goods within an additional period of time fixed by the seller under Art 63. Arts 49(1)(b) and 64(1)(b) declarations of non-performance within the period fixed.

So far as buyers are concerned, Art 49(1)(a) provides that a buyer may declare the contract avoided. Art 70 states that if the seller has committed a fundamental breach of contract, Arts 67, 68 and 69, relating to the exercise of rights against goods, do not impair the remedies available to the buyer on account of the breach. If the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a ‘fundamental breach of contract’

According to Article 49,

(1) The buyer may declare the contract avoided:

> *(a)* if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or *(b)* in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

Article 47(1) permits a buyer to fix an additional period of time of reasonable length for performance by the seller. Similarly, Art 63(1) permits a seller to fix an additional period of time of reasonable length for performance by the buyer. In the present case, the Respondent, as discussed in the earlier issue, had fundamentally breached the Contract. Additional period of time, sufficient enough upto six months were given. The time limit given, is a very reasonable one. But the Respondent, did by no means care to fulfill it’s contractual obligation. Thereby incurring losses upon the Claimant.

<u>The Claimant had little stock at his disposal.</u>

The Claimant's yearly requirements average 1,500 metric tons. The 400 metric tons contracted for would, therefore, equal slightly over its average requirements for three month. By the time of its purchase of 300 metric tons on 24 October 2002 it had slightly more than 100 metric tons in inventory. Around the end of November it would have had to cease producing certain of its products unless it had received additional cocoa. All that it purchases is used in its confectionary business. (Clarification No. 24)

Taking into consideration the tight situation, during the latter part of the year, the Claimant was forced to purchase cocoa from elsewhere. Thereby avoiding the contract, due to the reckless behaviour of the Respondent.

<u>There was clear avoidance of Contract.</u>

<u>Letter dated 25th October 2002 constituted avoidance of contract by the Claimant.</u>

According to Article 26 of the CISG, "A declaration of avoidance of the contract is effective only if made by notice to the other party". In his letter dated 25th October 2002, Mr.Sweet had informed the Respondent, that the Claimant had purchased substitute goods from Oceania Produce Ltd. at the current market price of US$ 2205.26 per metric ton. Which is US$ 289,353 more than the contract price, agreed upon with the Respondent. Thereby incurring a loss of the abovementioned amount.

In his letter, Mr.Sweet had mentioned of the time extension given to the Respondent, to fulfill it's contract. The contract was due on 31st May, but the Claimant had given a time extension. Beyond which the Claimant had to elsewhere for it's needs. He also speaks of the claim for damages, upon the Respondent. By looking into the letter and the very act that the Claimant had bought replacement goods, denotes the intention of the Claimant to avoid the contract.

The Claimant was entitled to avoid the contract, as the act of the Respondent amounted to fundamental breach. (Article 49, CISG). The delay in delivery of goods was of such a magnitude to amount to fundamental breach (As already proved in the previous issue). The lack of conformity of an important part of the delivered goods amounted to breach of contract by the seller, which unde4r Article 25, CISG, was fundamental since the buyer has been substantially deprived of what it was entitled under the contract. The buyer is entitled to rely on Art 49(1)(a). (1995) The ICA Bulletin Vol.6, No.2, 67.

The declaration is effective only if made by notice to the other party. [J W Carter, Breach of Contract, 2nd Ed, 1991], there is no formal procedure for avoidance. Again following the common law, [1015-18] no particular content is required in the notice: it is sufficient to inform the other party that the contract is being avoided. [Ibid].

Businessman cannot be expected to use legal jargon.

Mr.James Sweet, commodity buyer for the Claimant, had written a letter on 25th October 2002, to avoid the contract, which was as a result of the fundamental breach on part of the Respondent, to avail what was entitled to him under the contract. Being a businessman, one cannot expect him to use legal terms to avoid the contract. The notice of avoidance should sufficiently convey its intention even though the actual words need not be used (M.Marques Roque Joachim v. La Sarl Holding Manain Riviere).

Formal avoidance by the Claimant's counsel.

In order to be effective, though the notice must be sent by means of communications appropriate to the circumstances (Art 27) [Uniform Sales Law – Prof. Dr. Peter Schlectriem]. Here the Claimant has validly avoided the contract by notice to the other party, which was a consequence of the fundamental breach. [Case no. 238/1998, (CLOUT) abstract no. 473]. In the letter dated 15th November (Claimant's Exhibit No. 11), the counsel for the Claimant writes to the President of Equatoriana Commodity Exporters, stating formal avoidance of contract.

The main purpose for the Counsel to write the letter is to inform the Respondent about the fact that the contract was avoided the very moment it was not completed. Even

though considering the letter dated 25th October 2002, it is clear (Previous sub issue) that the intention of the Claimant was to avoid the contract in its entirety. Since the Respondent had alleged that the contract was not terminated, the legal counsel for the Claimant had done so. It was to clarify the stand of the Claimant, that the contract stood avoided.

ISSUE – 4

Whether the Respondent is liable to pay damages?

Respondent is liable to pay damages.

Claimant suffered loss due the Respondent's behaviour.

As per the concluded 19th November 2001, the Respondent was supposed to fix a date between the months of January and February, and was to obligated by the contract to deliver by between the months of March and May. But the Respondent, citing storm and Governmental ban, did not honour its commitment.

As a result of which, the Claimant had to finally, on 24 October 2002, purchased 300 tons of cocoa beans from Oceania Produce Ltd. at the then current market price of USD 2,005.26. It notified Equatoriana Commodity Exporters, S.A. of the purchase by fax and letter on 25 October 2002 (Claimant's Exhibit No. 8).

The damage suffered by the Claimant was due to the reckless and unmindful behaviour of the Respondent. As stated in the previous issue, the Claimant was never particular about the source of delivery, but was, about the time of delivery. But the Respondent did not pay heed. Therefore the Respondent was liable for the monetary damages suffered by the Claimant.

Calculation of damages.

The Respondent, alleges that the damages should be calculated from the time, when the legal counsel for the Claimant, purported to formally declare avoidance of contract, as the Respondent did not validate the intention of the Claimant's previous attempt to do so. Therefore the damages must be calculated from the exact date of avoidance of the contract. It was on the 25th October that the Claimant avoided the contract, and not on the date when the counsel wrote to the President of Equatoriana Commodity Exporters.

The Claimant bought additional, replacement cocoa from Oceania Commodity Produce Ltd. The 300 tons of cocoa bought was for a price of US$ 2,205.26, against the contract with the respondent, which was priced at US$ 1,240.75. The difference for, 300 tons of cocoa purchased from Oceania commodity Produce is US$ 289,353. And the Claimant contends that the Respondent, is obligated to pay the abovementioned amount as damages for the breach of contract committed by it.

REQUEST FOR RELIEF

Mediterraneo Confectionary Associates, Inc. requests the tribunal
to order:

- Equatoriana Commodity Exporters, S.A. to pay Mediterraneo Confectionary Associates, Inc. the sum of USD 289,353, being the difference between the contract price for the 300 tons of cocoa of USD 372,225 (USD 1240.75 per ton) and the cover price of USD 661,578 (USD 2,205.26 per ton);

- Equatoriana Commodity Exporters, S.A. to pay interest at the prevailing market rate in Mediterraneo on the said sum from 24 October 2002 until the date of payment;

- Equatoriana Commodity Exporters, S.A. to pay the costs of arbitration as well as the attorney's fees incurred by Mediterraneo Confectionary Associates, Inc. in this arbitration pursuant to Article 36 of the Arbitration Rules.

For Mediterraneo Confectionary Associates, Inc.

(Signed)__________________,9th December 2004

Counsels

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