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INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2004-2005

MEMORANDUM

for

MEDITERRANEO CONFECTIONARY ASSOCIATES, INC.

-CLAIMANT-

UNIVERSITY OF FLORIDA
LEVIN COLLEGE OF LAW

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TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Art.	Article
Arts.	Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
No.	Number
Para.	Paragraph
p/pp	Page/Pages
Sec. Comm.	Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat

TABLE OF AUTHORITIES

SCHLECTRIEM, PETER	Commentary on the UN Convention on The International Sale of Goods (CISG), Clarendon Press, 1998 (cited: Schlectriem)
	Uniform Sales Law-The Experience with Uniform Sales Law in the Republic of Germany (cited: Schlectriem)
PAUL VOLKEN AND PETER SARCEVIC	International Sale of Goods- Dubrovnik Lectures (cited: Volken)
SOUTHERINGTON, TOM	"Impossibility of Performance and Other Excuses in International Trade" Turku 2001 (cited: Southerington)
WEITZMAN, TODD	Validity and Excuse in the U.N. Sales Convention. 16 *Journal of Law and Commerce* (1997) (cited: Weitzman)
ZIEGEL, JACOB S.	Report to the Uniform Law Conference of Canada on the CISG (cited: Ziegel)

INDEX OF CASES AND ARBITRAL AWARDS

INDEX OF LEGAL SOURCES

Swiss Rules of International Arbitration, (Swiss Rules)

United Nations Convention on Contracts for the International Sale of Goods, (CISG) 1980

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York Convention) 1958

Secretariat Commentary on Articles of the UN Convention on Contracts for the International Sale of Goods

United Nations Commission on International Trade Law: Model Law on International Arbitration (UMLICA), 21 June 1985, A/40/17, Annex I.

STATEMENT OF FACTS

19 November 2001	Mediterraneo Confectionary Associates, Inc. ("CLAIMANT") and Equatoriana Commodity Exporters, S.A. ("RESPONDENT") entered into Cocoa Contract 1045 for the purchase of 400 tons of cocoa beans at US$1,240.75/metric ton to be delivered between March and May 2002, delivery date to be fixed by RESPONDENT during January – February 2002.
24 February 2002	RESPONDENT sent a letter to CLAIMANT in reference to a storm which had hit the cocoa producing area in RESPONDENT. The letter stated that no cocoa would be released for export through at least the month of March.
5 March 2002	CLAIMANT sent a letter to RESPONDENT indicating that the source of cocoa was irrelevant to CLAIMANT and it expected to receive its shipment.
10 April 2002	CLAIMANT contacted RESPONDENT to reiterate CLAIMANT'S need to have the 400 metric ton shipment of cocoa by the end of May.
7 May 2002	RESPONDENT sent a letter to CLAIMANT indicating that 100 tons of cocoa had been released for shipment later in May and that the remaining 300 tons would be shipped "in the very near future."
18 May 2002	CLAIMANT received the shipment of 100 tons of cocoa from RESPONDENT and paid for it at the contract rate of US$ 1,240.75/metric ton.
15 August 2002	CLAIMANT wrote RESPONDENT to protest the continued non-delivery of the promised 300 tons. CLAIMANT stated that if it did not receive

	notification from RESPONDENT as to when the 300 tons would be delivered, CLAIMANT would purchase elsewhere and hold RESPONDENT responsible for the extra costs.
24 October 2002	CLAIMANT, having heard nothing from RESPONDENT in six weeks, purchased 300 tons of cocoa from Oceania Produce limited at the current market price of US$2,205.26/ton. CLAIMANT notified RESPONDENT of the purchase by letter and stated that it would be making a claim for the extra costs.
11 November 2002	CLAIMANT sent a demand for payment of cover damages to RESPONDENT, requesting payment of US$ 289,353, representing the difference between the contract price and cover price.
13 November 2002	RESPONDENT replied to CLAIMANT's letter of 11 November and said that it would have been able to ship the 300 tons within several weeks. RESPONDENT claimed that cocoa contract 1045 had never been terminated and refused to pay the damages requested by CLAIMANT.
15 November 2002	Because RESPONDENT claimed the contract had not been terminated, CLAIMANT, in an abundance of caution, formally avoided the contract.
2 July 2004	CLAIMANT submits its request for arbitration against RESPONDENT.
6 July 2004	Letter from Swiss Chambers acknowledging receipt of claim
12 July 2004	Letter from Mr. Fasttrack, counsel for CLAIMANT, transferring administrative fees
16 July 2004	Letter from Swiss Chambers to both parties

21 July 2004	Letter from Mr. Fasttrack
10 August 2004	Letter from Mr. Langweiler, including answer and counter-claim of RESPONDENT
13 August 2004	Letter from Swiss Chambers acknowledging receipt of answer and counter-claim of RESPONDENT
31 August 2004	Letter from Mr. Fasttrack nominating Dr. CLAIMANT Arbitrator, answer to counter-claim
31 August 2004	Letter from Mr. Langweiler nominating Mr. RESPONDENT Arbitrator
3 September 2004	Letter from Swiss Chambers to CLAIMANT Arbitrator
6 September 2004	Letter from CLAIMANT Arbitrator consenting to appointment
13 September 2004	Letter from Swiss Chambers to arbitrators requesting designation of presiding arbitrator
16 September 2004	Letter from CLAIMANT Arbitrator designating Professor Presiding Arbitrator
22 September 2004	Letter from Swiss Chambers confirming Professor Presiding Arbitrator
1 October 2004	Procedural Order No. 1
30 October 2004	Procedural Order No. 2

INTRODUCTION AND REQUEST FOR RELIEF

CLAIMANT, Mediterraneo Confectionary Associates, Inc., respectfully makes the following submissions and requests the Arbitral Tribunal to find as follows:

- RESPONDENT was not excused from performance of its obligation to deliver cocoa to CLAIMANT under Cocoa Contract 1045.
- CLAIMANT is entitled to damages as a result of RESPONDENT'S failure to deliver cocoa as required by Cocoa Contract 1045.
- To award damages to CLAIMANT in the amount of US$289,353.
- To award interest to CLAIMANT at the prevailing market rate in CLAIMANT on the said sum from 24 October 2002 until the date of payment.
- To declare that RESPONDENT should pay the costs of the arbitration, including the attorney's fees incurred by CLAIMANT; and
- To decline the exercise of jurisdiction over RESPONDENT'S counter-claim

ISSUE 1: REPONDENT WAS NOT EXCUSED FROM DELIVERING COCOA UNDER CONTRACT 1045.

1. Art. 79 CISG does not excuse RESPONDENT from delivering cocoa under its contract with CLAIMANT. No impediment beyond RESPONDENT'S control caused its failure to perform its contractual obligations. **[A]**. RESPONDENT could be expected to have taken weather problems into consideration at the time of conclusion of the contract. **[B]** RESPONDENT could have avoided or overcome the consequences of its failure to adequately plan. **[C]**.

A. No impediment beyond RESPONDENT'S control caused its failure to perform its contractual obligations.

2. According to Professor Honnold, to prove a claim for excuse of contract, RESPONDENT must prove "that subsequent to the contract's formation", RESPONDENT could not reasonably be expected to have avoided or overcome [the impediment] or its consequences" pursuant to Article 79 CISG. (Weitzman pp. 265-290)

3. According to the text of the Secretariat Commentary to Article 79 CISG, all impediments are to some degree foreseeable. Further, storms have all occurred in the past and could be expected to occur in the future. (Secretariat Commentary) It is clear from the context of the contract that RESPONDENT has obligated himself to delivering the cocoa, though impediments arise. (CLAIMANT's Exhibit No. 2) The contract, propounded on 19 November 2001, and signed 23

November 2001, required the delivery of cocoa beans. The contract did not include terms for excusing performance due to unforeseeable impediments.

4. Further, the rationale behind Article 79 CISG "reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance." (Secretariat Commentary) RESPONDENT solicited the contract for the sale of cocoa beans to CLAIMANT on 19 November 2001. (Claimant's Exhibit No. 1) The contract required RESPONDENT to contact CLAIMANT between the January and February 2002 to fix a delivery date between the March to May 2002. (Claimant's Exhibit No. 2) Towards the end of the notification period, 24 Feb 2002, RESPONDENT contacted CLAIMANT about a storm that hit the cocoa producing areas in RESPONDENT. RESPONDENT had ample opportunity to try to deliver the cocoa prior to that. Equitoriana waited until after the storm had hit to contact CLAIMANT and tell them that they would not be able to perform the contract until the end of March. (CLAIMANT's Exhibit No. 3)

5. Courts have not granted an excuse under Article 79 of the CISG in many other circumstances where parties include the buyer's inability to obtain foreign currency, "hardship" caused by an almost 30% increase in the cost of goods, inability to deliver the goods because of an emergency production stoppage, and financial difficulties of the seller's main supplier. [*"The Interpretive Turn in International Sales Law: An analysis of fifteen years of CISG Jurisprudence,"* 34 *Northwestern J.L. of International Law and Business* (Winter 2004) 299-440]. As is evidenced by these representative cases, the courts have established a high standard for a party to successfully claim excuse due to impediment and therefore the courts are not incline to excuse a party simply because performance is more difficult or expensive. [*Id*.].

6. According to Art. 79 of the CISG, a performance can be excused where an impediment either renders performance impossible or frustrates the purpose of the contract. [*17 J.L. & Comm, 1998, 381-413*]. Art. 79 does not use the term impossibility, the requirement that performance be prevented does, however, seem to refer to impossibility instead of impracticability. [*Southerington, 2001*]. Similarly, in the case *Nuova Fucinati S.p.A. v. Fondamentall International A.B.,* the tribunal of *Monza* found that Art. 79 of CISG would not excuse a party unless performance had become impossible. [*Southerington, 2001*]. In addition, it is also not sufficient that the seller's performance becomes merely more expensive or more difficult. [*Id*.].

Therefore, the RESPONDENT performance should not be excused since the performance was not impossible within the meaning of Article 79 of the CISG.

7. Even if the governmental ban and the storm of 14 February 2002 amounted to an impediment, RESPONDENT'S performance was not impossible since the agreement did not specify the origin of the goods and the RESPONDENT could obtain cocoa from other sources. Therefore, the performance was not excused.

8. In our case, the storm of 14 February 2002 and the consequent governmental ban on exporting cocoa from RESPONDENT probably amounted to the definition of impediment. Specifically, impediment could be defined as something that impedes or obstruct performance, which the storm clearly did. The storm of 14 February 2002 has obstructed performance and thus, has probably amounted to impediment. However, the courts have held and experts agree that impediment appears to include an occurrence that absolutely bars performance. [*Id.*]. Therefore, in our case, the storm of 14 February 2002 and the governmental ban on export even if amounted to impediment, clearly did not render the performance impossible. Rather, it made the performance more difficult since RESPONDENT would have to obtain cocoa from other sources outside of RESPONDENT.

9. Furthermore, RESPONDENT is a trader in commodities and even though it largely trades commodities produced in RESPONDENT, it also trades commodities produced in other countries. [CLAIMANT's Statement No. 2]. It is assumed that if a company largely trades commodities, the company would have some established business relationships with producers or suppliers in other countries. If the RESPONDENT planned ahead and contacted some suppliers in other countries, the RESPONDENT could prevent the impediment and could fulfill his contractual obligation. The record does not show that RESPONDENT would take the extra step or would contact other supplier but rather it shows that RESPONDENT remained passive. Clearly, RESPONDENT is not new in the business and has established connections and suppliers in other countries. Therefore, RESPONDENT should explore new options since he guaranteed his ability to perform under the contract but failed to do so.

10. As the agreement indicates, the parties agreed that the Cocoa is to be of standard grade and count. [CLAIMANT's Exhibit No. 2]. In the phone conversation of 19 November 2001, Mr. Smart offered to sell cocoa to Mr. Sweet. Specifically, in the fax of 20 November 2001, Mr. Smart confirmed the conversation between the parties and specified the terms of their agreement.

As the agreement indicates the origin of the goods was not defined. [*Id*.]. Under the contract, the only requirement was that cocoa is of standard grade and count. The RESPONDENT was aware of the fact since Mr. Sweet reminded the RESPONDENT, in the letter of August 15, 2002, that the contract is for cocoa, not for RESPONDENT cocoa. Thus, the RESPONDENT was only responsible to deliver cocoa of standard Grade and Count and the Cocoa could be obtained from other sources not specifically stated in the contract. Since the RESPONDENT was on notice and knew that the market for cocoa in RESPONDENT is very difficult, RESPONDENT should not remain passive and should contact other sources to fulfill his contractual obligation. [CLAIMANT's Exhibit No.6].

11. In other cases of shortage, the courts have held that a seller can only claim impediment if goods of an equal or similar quality are no longer available on the market. [34 *Northwestern Journal of International Law and Business* (Winter 2004) 299-440]. Here, cocoa was not available in RESPONDENT due to the storm but it was available in other countries and other markets. Mr. Sweet was able to secure cocoa from a different source and that clearly proves that cocoa was available in other countries outside of RESPONDENT. Therefore, RESPONDENT may not claim impediment since cocoa of similar or equal quality could be obtained from other markets. Because the RESPONDENT trades commodities produced in the country of its principal place, it also trades commodities produced in other countries. (Claimant's Exhibit No. 2). Therefore, RESPONDENT would not be overly burdensome to purchase Cocoa from another country to fulfill its contractual obligation. Since the governmental ban due to a shortage was issued only in the RESPONDENT'S country, the RESPONDENT could obtain goods of an equal or similar quality on a different market since cocoa was still available. Therefore, RESPONDENT'S performance was not due to an impediment that made the performance impossible.

12. Additionally, the RESPONDENT was not under immediate pressure to deliver the cocoa and had a reasonable time to obtain cocoa from a different source. Since RESPONDENT was aware that no cocoa would be released for export through at least the month of March, RESPONDENT had sufficient time to look elsewhere and failed to do so. [CLAIMANT's Statement No. 5]. The letter of August 15, 2002, two and half months after the end of the contract period for shipping, Mr. Sweet requested an urgent action by the RESPONDENT. Specifically, Mr. Sweet requested a notification when the remaining 300 tons will be delivered otherwise Mr. Sweet stated that the

claimant will be forced to purchase the remaining amount elsewhere. Mr. Sweet has waited for a response from RESPONDENT for another two months. The RESPONDENT has failed to reply and notify claimant about the shipping date and further actions. Since RESPONDENT has not sent a notification of shipping the remaining amount and has not contacted Mr. Sweet since then, the RESPONDENT has failed to fulfill its contractual obligation by passively awaiting for the government to release cocoa.

13. The storm and export ban did not make the performance impossible, it made the performance more difficult and therefore, RESPONDENT may not claim impediment and the performance was not excused.

B. RESPONDENT could be expected to have taken weather and market fluctuations into consideration at the time of conclusion of the contract.

14. The requirements of Art. 79 of the CISG indicate that the RESPONDENT will be excused if the impediment is beyond the promisor's control. According to Schlechtriem, the obligator is always responsible for impediments that he could have prevented but, despite his control over preparation, organization, and execution, failed to do so. [*Southerington, 2001*]. Moreover, the seller should bear responsibility for his failure to fulfill his obligations also because he did not prove that it could not be reasonably expected either that he would take such impediment into account, when entering into the contact, or that he would avoid or overcome such an impediment and its consequences. [*Russia 16 March 1995 Arbitration proceedings 155/1994*].

15. At the time of conclusion of the contract, the RESPONDENT could plan and organize his resources to overcome any possible impediments, which were at the time in the RESPONDENT's control.

16. Courts have held that fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities. [*Vital Berry Marketing NV v. Dira-Frost NV, Vital Berry Marketing NV v. Dira-Frost NV, AR 1849/94, Rechtbank van Koophandel, Hasselt]*. Therefore, economic and governmental actions are clearly foreseeable events that must be taken into account in commercial agreements and planning by the seller. In our case, the weather's conditions are foreseeable events in international trade and therefore, they do not render performance impossible they only result in an economic loss, which is part of the normal risk of

commercial activities. Therefore, RESPONDENT should plan ahead to overcome these foreseeable events.

17. Furthermore, in another cases the courts have held that seller's failure to transfer the property is not due to an impediment beyond his control. "On the contrary, it was the responsibility of the [seller] to inquire into the background of the car. If he did, the [seller] should have found out that the car had actually been stolen, and thus should have refrained from selling it." [Germany, 2002 http://cisgw3.law.pace.edu/cases/020822g1.html]. In our case, the RESPONDENT should inquire about the weather conditions and since his place of business is in that country the RESPONDENT is clearly aware of the possibility of severe weather conditions. The RESPONDENT, therefore, should plan and secure another source of cocoa to overcome the possibility of severe weather conditions in his country and consequent governmental ban due to those conditions. As such the RESPONDENT is not excused from performance under Art. 79 of the CISG.

C. RESPONDENT could have avoided or overcome the consequences of its failure to adequately plan.

18. According to Rimke, "Disturbances must be avoided. In order to achieve this, measures need to be taken against impediments which are generally looming." RESPONDENT should have had other suppliers available because any number of factors could have destroyed the crop. RESPONDENT should have had contingency plans, as the reasonable cocoa suppler would.

19. In order to be excused from the contract, RESPONDENT has to prove that RESPONDENT could not have overcome the consequences of the impediment. RESPONDENT could have avoided the consequences of the contract, and thus, should not be excused from the contract.

20. Article 79 CISG "indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract". According to the Federal Supreme Court decision in Bundesgerichtshof 24 March 1999, "the reason for the seller's liability is that he has agreed to provide" the buyer "with goods that are in conformity with the contract". Further, the Bundesgerichtshof noted that "from the buyer's point of view, it makes no difference whether the seller produces the goods himself"… or whether the seller obtains the goods from suppliers. In this case, RESPONDENT admits in its Statement of Case that its cocoa would be included in Group C. There are several other countries in Group C that RESPONDENT could have

purchased comparable grade cocoa from and then delivered it to CLAIMANT. The countries include: Bolivia, Haiti, Indonesia, etc. (Respondent's Exhibit No. 1)

21. According to Professor Honnold, "if the goods needed were not of a "limited kind," and other goods were available to replace them, then performance would not be excused". Weitzman. In the instant case, cocoa was a fungible commodity. Cocoa is grown in countries other than RESPONDENT. The contract did not specifically call for the cocoa beans to come from RESPONDENT. (R.8) CLAIMANT correctly points out in Claimant's Exhibit No. 7 that the contract was for cocoa, not specifically cocoa from RESPONDENT's country.

22. RESPONDENT contends in its Statement of Case that even though the contract did not specifically provide for cocoa from RESPONDENT, there is no doubt that that is what was intended. However, RESPONDENT admits that a small portion of its business "involves the sale of commodities produced in other countries." (R.26) CLAIMANT could have inferred that RESPONDENT could get commodities produced in other countries to supply to the CLAIMANT. There is no proof that CLAIMANT knew that RESPONDENT primarily exported commodities made in RESPONDENT.

23. According to the court decision in Nuova Fucinati S.P.A. v. Fondmetall Int'l A.B., the court found that Article 79 of the CISG "would not excuse a party from its obligations unless performance had become "impossible." In the instant case, clearly performance of the contract was not impossible. RESPONDENT had many other options in procuring the cocoa to supply to the CLAIMANT. RESPONDENT was not the only place to procure Group C Cocoa. (R.31)

24. The court further concluded that even if Article 79 CISG only applies to "release from a duty made impossible by a supervening impediment," and it did "not seem to contemplate the remedy of dissolution of contract for supervening excessive onerousness." Nuova Fucinati S.P.A. v. Fondmetall Int'l A.B. In the instant case, performance of the contract was not impossible. Further, performance of the contract was not made excessively onerous by an impediment. The cocoa could have been procured from any number of countries. It may have decreased RESPONDENT's profit margin, but it would not have been excessively onerous.

25. According to Southerington, " if the subject matter of the contract was to be obtained from a specific source, the contract may become frustrated should this source become unavailable without the fault of either party. If the contract expressly stipulates that the goods are to be from a specified source, the contract is frustrated if this source fails." In Howell v. Coupland, where a

farmer sold potatoes that were going to be grown on a particular, specified parcel of land, and the crop failed, the court held “the contract frustrated thus relieving the farmer from liability in damages.”

26. However, if only one party intends a particular source, there is no frustration. In the "Finland birch timber" case, the court held the contract not frustrated though the seller intended to get timber from Finland, but was not able to do so because of the outbreak of a war. (Southerington.) In that case, the buyer did not care about the particular origin of the goods, but instead cared only about the goods. (Southerington). Southerington noted that “a contract is not frustrated even if the source that failed was the only possible source as long as the buyer was not aware of this.”

27. The instant case is similar to the latter example. RESPONDENT may have intended the cocoa to come from Equatoriana, however, CLAIMANT was not aware of this. Further, unlike the latter example, Equatoriana was not the only source of cocoa. This weighs in favor of CLAIMANT, because in the Finland case, Finland was the only place to get the timber, and the court held that the contract was not frustrated because the buyer did not know this.

28. Further, according to Rimke, “if a disturbance has already revealed itself, it has to be overcome as quickly as possible; to overcome means to take the necessary steps to preclude the consequences of the impediment.” “The basis of reference is what can reasonably be expected from the party concerned, and that is what is customary, or what similar individuals would do in a similar situation.” (Rimke.)

29. In the instant case, RESPONDENT informed CLAIMANT about the storm and its uncertainties in supplying cocoa on 24 February 2002. (R.9) RESPONDENT did not inform CLAIMANT about the status of the cocoa crop until 7 May 2002. (R.12) In that letter, RESPONDENT told CLAIMANT that it would ship 100 tons of cocoa to CLAIMANT, and that RESPONDENT would inform CLAIMANT of the details on when it could ship the remainder of the contract cocoa. (R.12) As of 25 October 2002, RESPONDENT still had not informed CLAIMANT about the status of the remainder of cocoa, when CLAIMANT wrote RESPONDENT a letter informing RESPONDENT that CLAIMANT had purchased the remainder of the cocoa elsewhere. (R.12) If CLAIMANT could find another country to buy cocoa, then RESPONDENT could easily have found another country to purchase the cocoa then resell it to CLAIMANT.

30. Further, the cocoa was originally supposed to be delivered between the period of March-May 2002. (R.7) RESPONDENT did not even respond to CLAIMANT about the status of the remaining 300 tons of cocoa until the end of October, approximately 5 months after the end of the contractual delivery period. It seems that RESPONDENT made no attempt to avoid or overcome the consequences of the impediment on the contract.

31. RESPONDENT was under a duty, pursuant to Article 79 CISG to avoid or overcome the consequences of the impediment to the contract. RESPONDENT did not avoid or overcome the consequences of the storm on the contract for cocoa, and thus, should was not excused from the performance of the contract.

ISSUE 2: CLAIMANT IS ENTITLED TO DAMAGES AS A RESULT OF RESPONDENT'S BREACH OF CONTRACT.

32. Under Articles 45(1) b and 51(1) of the CISG, if the seller fails to perform any of his contractual obligations, he is liable for damages that the buyer suffers. (Schlectriem Commentary 356). Claimant was entitled to damages because it was entitled to avoid cocoa contract 1045. **[A]**; and it successfully avoided the contract **[B]**.

A. CLAIMANT was entitled to avoid cocoa contract No. 1045

33. Under Article 49(1), when a seller does not deliver according to the contract, the buyer may declare the contract avoided if the delay in delivery amounts to a fundamental breach of contract within the meaning of article 25 **[1]**; or if he has fixed an additional time for performance by the seller and the seller has not delivered within that time **[2].**

1. RESPONDENT committed a fundamental breach of contract

34. Under Article 25 of the CISG, [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.

35. The extent to which the breach interferes with other activities of the injured party is determinative of substantial detriment and is the basic criterion for a breach to be fundamental. *Secretariat Commentary*.A*rticle 25, para 3.* A future fundamental breach "may be clear either because of the words or actions of the party which constitutes a repudiation of the contract or because of an objective fact, such as . . . or the imposition of an embargo." *See Secretariat*

Commentary, Art. 72 para 2. Here, RESPONDENT makes it clear that he was unable to deliver the 300 tons of cocoa as a result of an embargo. (R.A. 9) Additionally, RESPONDENT's failure to deliver the 300 tons of cocoa resulted in a detriment to CLAIMANT and substantially deprived CLAIMANT of what he was entitled to expect under the contract. CLAIMANT was clearly entitled to expected delivery between March and May of 2002 by the express terms of the contract which specified the period for delivery. (C.E. 2) CLAIMANT's re-emphasized its expectations in a letter to RESPONDENT on 10 April 2002, stressing that irrespective of RESPONDENT's circumstances, "we expect you to deliver the entire 400 metric tons you agreed to deliver and to do it by the end of May." (C.E.5) Nevertheless, in mid November 2002, more than five months after the end of May, RESPONDENT was still unable to deliver the cocoa to CLAIMANT. (C.E.10) At CLAIMANT's detriment, it would have had to cease producing certain of its products within two weeks of that date as a result of RESPONDENT's breach. (Clar. 24)

36. Furthermore, at the end of September 2002, RESPONDENT, in response to notification of CLAIMANT's impending detriment stated that there was "no indication" as to when the impending embargo would be lifted. (Clar. 22) Therefore, RESPONDENT's subsequent assertion that rumors were circulating for "some time" that the embargo would be lifted, can only be accurate if "some time" refers to a period after RESPONDENT's September 29 conversation with CLAIMANT. (C.E. 10) Even so, RESPONDENT having been notified of CLAIMANT's intention to purchase elsewhere failed to communicate to CLAIMANT any possibility that cocoa might soon become available. Moreover, by RESPONDENT's admission it would still have taken several weeks from mid-November for them to ship the goods to CLAIMANT (C.E. 10), confirms CLAIMANT's fears that it would have had to cease production of certain goods. (Clar. 24)

37. Finally, the element of foreseeability of consequences of the breach is fulfilled since the contract expressly stated a period during which delivery was required. (C.E. 2) Moreover, CLAIMANT's letter to RESPONDENT on 5 March 2002 emphasized the possible consequences if RESPONDENT breached the contract (C.E. 4) CLAIMANT made it clear to RESPONDENT that RESPONDENT's failure to deliver the goods according to the terms of the contract would cause CLAIMANT to seek replacement goods and reimbursement for any

additional costs incurred. (C.E. 4) Hence, this consequence was clearly foreseeable to RESPONDENT or a reasonable person of the same kind in the same circumstances.

38. RESPONDENT should have foreseen that CLAIMANT would have to purchase cocoa elsewhere because CLAIMANT informed RESPONDENT that it needed the cocoa soon and would purchase it would avoid the contract and buy cocoa elsewhere if it was not delivered soon. Any reasonable person would have assumed that at this point, two and a half months after the last day delivery was supposed to be made under the contract, that if CLAIMANT did not receive the cocoa soon that CLAIMANT would have to declare avoidance. A reasonable seller should have foreseen that by not delivering the cocoa or even sending a letter stating when delivery could be made within the 6 weeks after receiving the CLAIMANT'S demand for performance, that a CLAIMANT would need to purchase the goods elsewhere.

39. Additionally, a breach of contract is considered fundamental to justify avoidance when the injured party has no further interest in the performance of the contract after the particular breach. (*Schlechtriem* Uniform Sales Law 207). When deciding whether a delay in delivery amounts to a breach of contract, it is measured by the terms of the contract concerning the time of delivery, in our case March to May, and not by the amount of the damages *(Schlechtriem* Uniform Sales Law 207). RESPONDENT'S failure to deliver the remaining 300 tons of cocoa in accordance with the time frame laid out in the contract resulted in a fundamental breach entitling CLAIMANT to avoid the contract under CISG Article 49(1) a.

2. RESPONDENT did not deliver within an additional time fixed by CLAIMANT

40. On February 24th RESPONDENT notified CLAIMANT that the storm that had hit RESPONDENT had hurt the cocoa supply and that when the storm hit RESPONDENT on February 14, 2002 RESPONDENT Government Cocoa Marketing Organization had announced that no cocoa would be released for export through at least the month of March. (CLAIMANT's Exhibit No. 3) CLAIMANT responded in a letter on March 5, 2002 and stated that although it did not immediately need the cocoa, it would need it later in the year. At that point, CLAIMANT stated that if the RESPONDENT had not delivered the cocoa by then, that CLAIMANT would need to look elsewhere, and that RESPONDENT would need to reimburse CLAIMANT for any additional costs (CLAIMANT's Exhibit No. 4). CLAIMANT reiterated this point in a letter written by CLAIMANT on August 15th (CLAIMANT's Exhibit No. 7).

CLAIMANT stated that it would need the remaining 300 tons of cocoa soon. At this point, CLAIMANT could not wait any longer for RESPONDENT to perform their contract. CLAIMANT went even further to specifically inform RESPONDENT that if they did not deliver soon, that CLAIMANT would purchase elsewhere, in essence CLAIMANT put RESPONDENT on notice that if RESPONDENT did not perform soon, that CLAIMANT was going to avoid the contract and would hold RESPONDENT liable for damages.

41. In Switzerland a similar case was before the Schweizerisches Bundesgericht (Case No. 4C.105/2000). In that case an Italian Seller and a Swiss buyer entered into a contract for Egyptian cotton to be delivered by the 5th of June. A month later, the Egyptian authorities had increased the price of cotton so the seller asked the buyer to accept an increased sale price that the buyer accepted. The buyer asked the seller to perform, then, in the absence of any response, purchased substitute goods at a higher price. The Supreme Court citing article 33, affirmed the lower court's decision. The court stated that because the seller had not performed its obligation to delivery the goods, the buyer had validly avoided the contract. Applying articles 45(1), 74 and 75 CISG, the Court granted damages and interest to buyer for the substitute purchase considering the difference between the contract price and the price in the substitute transaction.

B. CLAIMANT successfully avoided the contract

42. In the case of a fundamental breach the injured party may declare the contract avoided (2) Article 33 contains a clause that applies where the parties have reached no agreement regarding a precise date for delivery that the seller must deliver the goods within a "reasonable time." Schlectriem Commentary 262. The contract required delivery of no later than May 31, 2003. On March 5, 2003 CLAIMANT had notified RESPONDENT that "Although we are not under immediate pressure to receive the contracted cocoa, we will be later this year. (CLAIMANT's Exhibit No. 4)" On April 15 CLAIMANT told RESPONDENT that it expected RESPONDENT "to deliver the entire 400 metric tons you agreed to deliver and to do it by the end of May (which was the contract deadline for delivery)(CLAIMANT's Exhibit No. 5)." CLAIMANT was forced to purchase goods elsewhere because it had become apparent that it was no longer reasonable to rely on RESPONDENT who had not only failed to deliver by the end of May but had also failed to fix a delivery date which was required by the end of February. At the time the CLAIMANT contracted with another seller to buy the cocoa, the delivery had been almost 5 months overdue. On November 13, 2003, RESPONDENT claimed that CLAIMANT should not have bought

cocoa elsewhere because RESPONDENT would have been able to ship the cocoa "within the next several weeks." At this point, RESPONDENT still could not fix a shipping date, which was required to have been set no later than approximately eight and a half months previously. RESPONDENT fundamentally breached the contract by failing to deliver 300 tons of cocoa during the stated time period fixed in the contract and therefore the CLAIMANT is entitled to avoid the contract.

43. According to Article 33, if a seller does not deliver goods by the due date, he will have failed to perform his contractual obligation and it is irrelevant whether he can deliver or not sometime in the future. (Schlectriem Commentary 357). Under Article 33(b), if the period of time for delivery has been fixed, delivery must be made at the earliest by the beginning and at the latest by the end of that period (Schlectriem Commentary 263). Under the *Cocoa 1045* contract, the seller had the option to choose a delivery date between March and May 2002 and to give notice to the CLAIMANT of the date between January and February 2002 (CLAIMANT exhibit No. 2). Once RESPONDENT failed to give notice of the delivery date on the last day of February and then delivered to CLAIMANT only 100 of the 400 tons of cocoa beans required by the last day of May, RESPONDENT had failed to perform their obligations in breach of the contract; therefore CLAIMANT is entitled to damages. As a result, Article 45(1) b forms the basis of the CLAIMANT'S right to claim damages where RESPONDENT breached the contract (Schlectriem Commentary 356). Additionally, Article 45(2) states "the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." As a result, a buyer who decides to avoid the contract under Article 49 may also claim damages under Article 74 for the loss suffered as a consequence of the breach (Honnold 302).

44. Under Article 74 CISG, CLAIMANT is entitled to damages in the sum equal to the loss, including loss of profit suffered as a consequence of RESPONDENT's breach, since RESPONDENT foresaw or should have foreseen the possible consequences of the breach at time the contract concluded. The test for forseeability is a very generous test under article 74 CISG which allows damages to be measured by the actual result of a covering purchase by a seller. *(Ziegel)* The test also appears to be broad enough to include consequential damages suffered by a seller as a result of a buyer's failure to subsequently pay the price. *Id.* The common law position has been that a buyer who cancels a contract is not deprived of his entitlement to damages.

45. There is no "automatic avoidance" yet the buyer may avoid the contract by a "mere declaration." (Volken 196). As a rule, it is only avoidance of the contract that makes it clear that the contract will not be performed (Schlectriem Commentary 575). On August 15, 2003 CLAIMANT after repeatedly asking when the cocoa would be shipped declared "if we do not receive notification from you soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere. If we are forced to purchase elsewhere, we will hold you responsible for our extra costs (CLAIMANT's Exhibit No. 7)." This put RESPONDENT on notice that if they did not respond, that the contract would be avoided. RESPONDENT did not respond and six weeks later, CLAIMANT justifiably contracted with another merchant for the cocoa.

ISSUE 3: CLAIMANT'S DAMAGES

46. RESPONDENT Commodity Exporters ("RESPONDENT") is obligated to pay damages to CLAIMANT Confectionary Associates ("CLAIMANT") for their breach of contract. Article 45(1) states that "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77." CISG Article 45(1).

47. RESPONDENT entered into a lawful contract with CLAIMANT, yet was unable to fulfill its obligations of the agreement. The contract created on 23 November 2001 was for 400 metric tons net of cocoa beans to be sold at USD 1,240.75 per metric ton, for a total sum of USD 496,299.55. (Claimant's Exhibit No. 2.) RESPONDENT breached its contract to deliver cocoa. CLAIMANT was forced to seek out and pay for substitute goods, which RESPONDENT is responsible for.

48. RESPONDENT delivered only 100 metric tons of the cocoa beans, which CLAIMANT immediately paid for. CLAIMANT's Exhibit No. 7. RESPONDENT neglected to provide the remaining contracted 300 metric tons. When a seller fails to perform any of his obligations under a contract, the buyer may claim damages as provided in articles 74 to 77 of the CISG. CISG Article 45(1)(b). According to Article 74, "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." CISG Article 74. RESPONDENT irresponsibly made no attempts to reply to CLAIMANT's repeated inquiries as to the status of its order. CLAIMANT's Exhibit No. 9. Moreover, it is obviously foreseeable that a company that contracts for certain goods, but

does not receive them, will look elsewhere. CLAIMANT was left wanting the goods it was promised, so it was forced to purchase the necessary goods from Oceana Produce. This purchase did not alleviate RESPONDENT's responsibility to meet its contract. RESPONDENT, through its fundamental breach of its cocoa contract 1045 by at least 15 August 2002, is obligated to pay for its failure to perform. Thus, under the uniform law for international sales, CLAIMANT should receive its full requested amount from arbitration of USD 289,353.

49. Cover is normally possible whenever a breach occurs because one can usually buy similar goods in a market economy. The CISG directly supports the remedy of cover, if the party seeking recovery costs acts reasonably. CISG Article 75. CLAIMANT notified RESPONDENT that it expected the delivery of the remaining cocoa beans or it would look elsewhere. According to Article 74, "damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." CISG Article 74. CLAIMANT'S 15 August 2002 letter made the damages created by the cost of cover foreseeable. In addition, CLAIMANT gave RESPONDENT a reasonable amount of time to respond to this letter. Since RESPONDENT declined to respond in any form, cover was the appropriate remedy. At the very least, RESPONDENT is responsible for the fair market value of the replacement cocoa beans. CISG Article 76.

A. CLAIMANT is entitled to cover damages due to RESPONDENT's failure to satisfy the contract.

50. RESPONDENT did not take the proper steps to ensure satisfaction of its contract with CLAIMANT and is therefore responsible for the cover damages. A party that elects not to satisfy a contract must face the consequences for doing so. Article 75 states "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74." CISG Article 75. CLAIMANT avoided the contract shortly after August 15, but well before the cover sale occurring on October 24th. During this cover sale, CLAIMANT purchased reasonable goods within a reasonable time, as required by the international sales law. Therefore, they are entitled to the difference in price between the cover sale and the amount contracted for. Further, CLAIMANT tried to mitigate

damages by entering into a cover sale early when the market trend showed that cocoa prices were on the rise; hence, it should not be punished for this attempt to reduce damages for RESPONDENT.

1. CLAIMANT acted within a reasonable manner and within a reasonable time in enacting a cover sale.

51. The uniform law for international sales allows two different states to make any contract to their agreement. There is no issue that a contract existed between these parties. Even after RESPONDENT failed to meet the specified deadline, CLAIMANT still provided RESPONDENT with the opportunity to fix its breach of the contract as an act of good faith. RESPONDENT was given from February to the middle of October to give any notice that it was going to satisfy its obligation. It declined to do so and should be held responsible for its failure.

52. CLAIMANT undoubtedly has acted with good faith regarding the price of the cocoa beans. CLAIMANT informed RESPONDENT that the market was rising and that if it had to purchase elsewhere, RESPONDENT would be responsible for the considerable extra costs. CLAIMANT's Exhibit No. 7. The year's trend was for the price of cocoa beans to continue to increase. RESPONDENT's Exhibit No. 3. RESPONDENT was aware of this trend due to its position within the cocoa industry. There was no reason considering the projections based on the trends of the industry for either party to believe that the price would lower any time soon. RESPONDENT may claim that there were rumors that the price of cocoa would decrease, but there is no indication that these rumors are substantiated or that CLAIMANT were aware of them. It is reasonable to expect a company to know the prices of its trade. Contrarily, it is unreasonable to expect a company to both be aware and adhere to mere rumors, especially if the rumors go against the trend of the entire year.

53. CLAIMANT notified RESPONDENT of its need of the cocoa to mitigate the loss RESPONDENT would be responsible for. According to Article 77, "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach." CISG Article 77. RESPONDENT could have replied that it intended to fulfill the contract, but it chose not to do so. After reasonably waiting a month for any reply from RESPONDENT, CLAIMANT purchased elsewhere to mitigate the damages that would derive from both a loss of profit and the rising price of cocoa. RESPONDENT finally replied to CLAIMANT's inquiries two days after it was

notified it was subject to damages for breach of contract. Claimaint's Exhibit No. 9, CLAIMANT's Exhibit No. 10. This same reply came two months after it was notified that CLAIMANT would look elsewhere for cocoa if it was not told when the 300 tons of remaining cocoa would be shipped. CLAIMANT's Exhibit No. 7, Claimaint's Exhibit No. 9. RESPONDENT finally acted responsibly by replying, but this was long after it became subject to damages.

2. CLAIMANT was forced to enter into a contract with Oceana to cover RESPONDENT's breach of contract.

54. RESPONDENT will attempt to avoid paying damages by claiming that CLAIMANT's purchase was ordinary build-up and not a cover. This argument is weak, at best. CLAIMANT's August letter explicitly stated that RESPONDENT did not indicate when they would satisfy the delivery of the remainder of the contract, they would seek the cocoa beans elsewhere and RESPONDENT would be responsible. A claim of ordinary build-up would be insufficient since there was never any indication in any correspondence that CLAIMANT was purchasing the cocoa beans to store for future use. CLAIMANT's cover purchase of the cocoa was an attempt to mitigate damages by preventing loss of profit. CLAIMANT needed the cocoa, which RESPONDENT neglected to provide. Since location of the cocoa beans was not addressed in the contract, RESPONDENT had the discretion to purchase the cocoa elsewhere to meet its requirements. RESPONDENT opted not to. RESPONDENT made CLAIMANT wait beyond the agreed upon date. RESPONDENT forced CLAIMANT to purchase elsewhere, thereby undertaking the responsibility of the USD 289,353 cover price.

3. CLAIMANT avoided the contract and is entitled to cover damages.

55. CLAIMANT avoided the contract in the August 15th letter to RESPONDENT. In Mr. Sweet's letter, dated August 15, he stated that "if we (CLAIMANT) do not receive notification from you (RESPONDENT) soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere." CLAIMANT's Exhibit No. 7. This statement is a declaration of avoidance. CLAIMANT impliedly stated that the contract will become avoided and CLAIMANT will negotiate a cover sale unless RESPONDENT in a timely manner takes the affirmative step to announce when RESPONDENT plans to deliver the cocoa. However, RESPONDENT never responded. Therefore the contract was avoided after a reasonable time expired for RESPONDENT to respond.

56. The statement made by Mr. Sweet is almost identical to the one made in ICC Arbitration Case No. 8128 of 1995, where the Court found that the statement was a proper avoidance. [ICC No. 8128 of 1995] In the ICC case, the seller did not deliver a portion of an installment contract by the contracted date. Id. The buyer sent the seller a letter stating that the buyer wanted a definitive answer as to when the delivery would be made or else the buyer would have to purchase elsewhere. However, the seller did not give a definitive answer. Id. Therefore, the court found that this statement amounted to an avoidance of the contract. Id. The ICC Court stated that, "to interpret the declarations and the conduct of a party there is a need to establish its real intent if the other party knew it at all. The guide for this interpretation is the manner in which a reasonable person would have understood this declaration or this conduct in the same circumstances." Id. CLAIMANT's letter of August 15 is materially the same as the letter sent in the ICC case. Similar to the ICC case letter, CLAIMANT's letter requested a notification as to when the delivery of the 300 tons of cocoa would be shipped. However, RESPONDENT never responded just as the seller in the ICC case could not give a definitive date. A reasonable person interprets the statement, "if we do not receive notification from you soon when you will be shipping the remaining 300 tons, we will have to purchase elsewhere," to mean that if RESPONDENT does not provide a date of delivery, the contract is avoided and CLAIMANT will negotiate a cover sale. Id. Therefore, the CLAIMANT's August 15 letter should be deemed an avoidance because RESPONDENT never responded.

4. CLAIMANT declared the contract avoided in the proper manner.

57. Article 26 states that "a declaration of avoidance of the contract is effective only if made by notice to the other party." As stated in the previous section, CLAIMANT gave notice to RESPONDENT of avoidance of the contract in the letter dated August 15, 2002. (Claimant's Exhibit No. 7.) Therefore, the declaration of avoidance was both appropriate and effective.

58. RESPONDENT should pay damages in the amount of USD 289,353 to CLAIMANT.

59. The contract price paid by CLAIMANT for the cover sale was US$ 2205.26 per ton. The contract called for 300 tons of cocoa, creating a total price of US$ 661,578. The initial contract price of cocoa was US$ 1240.75 per ton. The total contract price for cocoa was US$ 372,225. Thus, the difference between the cover sale price and the contract price is US$ 289,353. Therefore, RESPONDENT owes CLAIMANT the amount of USD 289,353 in damages.

B. If the tribunal finds that CLAIMANT is not entitled to cover damages, then CLAIMANT is entitled to the current price remedy of cocoa.

60. If the Tribunal finds there was no cover sale, CLAIMANT can receive damages for the current price of the goods. Article 76 states "(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Article 74. (2). For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

61. The Secretariat's Commentary to Art 75 states that if cover damages do not apply then article 76 damages should apply. (Secretariat's Commentary Art. 75). In the instant case, if the tribunal believes that the cover price should not be awarded, then the current price of cocoa should be awarded.

1. CLAIMANT avoided the contract on August 15 due to RESPONDENT'S failure to perform.

62. CLAIMANT'S August letter provided notice of its avoidance of the contract. The August 2002 market price for cocoa was US$ 1960.55, whereas the contract price between the two parties was US$ 1240.75. (Respondent's Exhibit No. 3). Therefore, the cost for 300 tons of cocoa in August 2002 was US$ 588,165, whereas the contract price for 300 tons of cocoa was US$ 372,225. The difference between the market price and the contract price is US$ 215,940. Therefore, RESPONDENT owes damages in the amount of US$ 215,940 if the arbitrators believe the cover price is not applicable.

2. If the contract was not avoided on August 15, then the contract was avoided on October 25.

63. If the tribunal does not find that CLAIMANT declared the contract avoided on August 15, 2002, then the tribunal should find that CLAIMANT declared the contract avoided on October 25, 2002. On October 25, Mr. Sweet, an agent of CLAIMANT, sent a letter to RESPONDENT stating that CLAIMANT had purchased 300 tons of cocoa elsewhere. (Claimant's Exhibit No. 8).

64. Schlectriem points out "a declaration of avoidance does not need to observe any requirement as to form." (Schlectriem p. 188). Further, he states that "it should be possible for a declaration to be made by conduct." *Id*. Therefore, though the letter never expressly stated that the contract is avoided, it effectually did so. There is no doubt that RESPONDENT understood that the contract was avoided because CLAIMANT stated that they performed a cover sale for the remainder 300 tons of cocoa that RESPONDENT never delivered. Therefore, CLAIMANT'S cover sale declared the contract avoided.

65. The market price for cocoa in October 2002 was US$ 2,205.26 for a total of US$ 661,578. The total contract price for 300 tons of cocoa was US$ 372,225. The difference between the two prices is US$ 289,353. Therefore, RESPONDENT should pay damages in the amount of US$ 289,353 if the tribunal believes the contract was not avoided until October.

3. If the contract was not avoided on October 25 then the contract was avoided on November 15.

66. On November 15, 2002, Horace Fastrack, an agent for CLAIMANT, sent a letter to Albert Tender, the president of RESPONDENT, that stated "I wish now to state clearly that the Mediterraneo Confectionary Associates, Inc. considers the referenced contract to be terminated." (Claimant's Exhibit No. 9.) This statement unarguably demonstrates that CLAIMANT declares the contract avoided.

67. The market price for cocoa in November 2002 was US$ 1,814.16. The November market price for 300 tons of cocoa was US$ 544,248. The difference between the November market price of US$ 544,248 and the contract price of US$ 372,225 is US$ 172,023. Therefore, at the bare minimum, RESPONDENT owes damages of US$ 172,023 to CLAIMANT.

ISSUE 4: THE TRIBUNAL DOES NOT HAVE JURISDICTION TO CONSIDER RESPONDENT'S COUNTERCLAIM REGARDING SUGAR CONTRACT 2212

A. The Tribunal has no jurisdiction to consider the counterclaim of RESPONDENT

68. RESPONDENT claims that the Tribunal has jurisdiction to consider their counterclaim against CLAIMANT due to Art. 21(5) of the Swiss Rules. (*Answer and Counter-Claim* at 17). Article 21(5) states that "[t]he arbitral tribunal shall have jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the

arbitration clause or is the object of another agreement or forum-selection clause." (*Swiss Rules*, Art. 21(5)).

69. CLAIMANT objects to the application of the Swiss Rules generally—and Art. 21(5) specifically—to the dispute over the sugar contract. (*See Answer to Counter-Claim* at 3). CLAIMANT has consented to using the Swiss Rules for the balance of the arbitration; that consent does not extend to their application to the sugar contract dispute. (*See Answer to Counter-Claim*).

70. The Tribunal should respect the express choice of forum and choice of laws in the Sugar Contract. (*Compare Swiss Rules*, Model Arbitration Clause *and* Art. 1; *see also Procedual Order No. 2* at 6 (recognizing that arbitrating in commodity association tribunals may provide some benefits, as against general international tribunals, when the dispute is over the quality of the goods—as in this case).

71. This is not a case in which one party is claiming fraud as a basis for denying jurisdiction to an arbitral tribunal. (*See* Case 383, CLOUT; *Deco Automotive Inc. v. G.P.A. Gesellschaft Fur Pressenautomation MbH*, [1989] O.J. No. 1805 (Canada: Ontario District Court)). In that case a Canadian court denied jurisdiction to the I.C.C. Court of Arbitration, concluding that there was no arbitration agreement which went to the subject-matter of the dispute. (*Id.*).

72. Moreover, this is not a case where there is a question of conflicting contractual arrangements regarding the same undertaking. (*See* Case 382, CLOUT; *Methanex New Zealand Ltd. v. Fontaine Navigation S.A., et. al.*, [1998] 2 F.C. 583, 142 F.T.R. 81 (Fed. T.D.) (Federal Court of Canada, Trial Division)). In that case, two defendants were not allowed to challenge jurisdiction in Canada—because of a letter of undertaking regarding litigation in Canada signed by both defendants, none of the otherwise possibly good challenges they had to jurisdiction in Canada could succeed. (*Id.*).

73. In the instant case, CLAIMANT and RESPONDENT are party to two valid contracts with two valid arbitration clauses in those contracts. The subject-matter of the first contract should not be mixed with the subject-matter of the second contract when there is a valid arbitration clause for each. Further, there are no conflicting arbitration agreements regarding the same undertaking. There are simply different arbitration agreements regarding different undertakings. This Tribunal should respect CLAIMANT's and RESPONDENT's actual arbitration agreements.

74. The CCIG Rules, which the parties specifically chose in the formation of the cocoa contract, contained no provision like Art. 21(5) (which gives the Tribunal jurisdiction over a dispute that "is the object of another arbitration agreement or forum-selection clause"). (*See CCIG Rules*). This is significant in that CLAIMANT, under the CCIG Rules, retained the right to have any disputes which arose under a contract which included different arbitration provisions arbitrated in accordance with those provisions.

75. The UNCITRAL Model Law on International Commercial Arbitration, adopted by the countries with an interest in this arbitration, does not confer jurisdiction in the manner that Art. 21(5) of the Swiss Rules does. (*See UNCITRAL Model Law on International Commercial Arbitration*, Art. 16-17 (hereafter *Model Law*)). Under the Model Law, as well as the Swiss Rules, the tribunal may rule on its jurisdiction, but CLAIMANT asserts that the tribunal may not rule on the merits of the sugar contract dispute, and as such the tribunal should dismiss the counterclaim from the arbitration. (*Model Law*, Art. 16-17; *Swiss Rules*, Art. 21; *Answer to Counter-Claim* at 2-4). Jurisdiction over that dispute does not belong to the instant tribunal.

76. Art. 1 states that that the Swiss Rules shall only govern when an arbitration clause "refers to these Rules, or to the arbitration rules of" certain enumerated Chambers of Commerce and Industry, or to "any further Chamber of Commerce and Industry that may adhere to these Rules." (*Swiss Rules*, Art. 1(1)). On those grounds, the Swiss Rules govern in the present arbitration—that is, the claim regarding the Cocoa Contract. Also on those grounds, the Swiss Rules does not govern the Sugar Contract, where the arbitration clause specifically called for arbitration in Port Hope, Oceania under the Rules of Arbitration of the Oceania Commodity Association.

77. Importantly, under the Rules of Arbitration of the Oceania Commodity Association, there is no provision like that found in the Swiss Rules. (*See Procedural Order No. 2* at 4). Under those rules, only claims or set-off defenses arising out of the *same* contract may be heard by the tribunal. (*Id.*).

78. If the tribunal decides to make an award based on the sugar contract, it will probably not be enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter New York Convention). (*See New York Convention*, Art. V). Article V(1) states that the recognition and enforcement of the award "may be refused" if the party (CLAIMANT in this case) submits proof that:

79. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced. (*New York Convention*, Art. V(1)(c)).

80. The counterclaim brought by RESPONDENT was not contemplated by CLAIMANT'S submission to arbitration—any award based on that counterclaim would be beyond the scope of the submission to arbitration, rendering the award unenforceable as to that aspect of the award.

81. Though the Swiss Rules were purportedly formed with intent to reflect "[c]hanges and additions" to "modern practice and comparative law in the field of international arbitration," each of the countries with an interest in this arbitration retains their adoption of the New York Convention. (*Swiss Rules*, Introduction (b)(ii); *see Claim* at 14-15).

82. One court in Germany, while recognizing the tribunal's authority to rule on its own jurisdiction, refused to render judicial assistance to arbitral proceedings that went beyond the terms of the arbitral submission. (Case 403, CLOUT; original in German; www.dis-arb.de (Germany: Highest Regional Court of Bavaria; 4Z SchH 6/99; 1999)). The court did not have to act because the subject-matter of the dispute did not fall within jurisdiction of the tribunal. (*Id.*).

83. Another court in Germany, while dismissing an action to set aside an arbitral award for lack of jurisdiction in the antecedent arbitral proceedings, held that arbitration clauses should be interpreted according to general principles of interpretation with the goal of meeting the intentions of the parties. (Case 373, CLOUT; original in German; [2000/2] Recht und Praxis der Schiedsgerichtsbarkeit 13 (Germany: Kammergericht Berlin; 28 Sch 17/99)). Thus, the tribunal should not base an award on the dispute over the sugar contract. That is far beyond the scope of the submission to arbitration by the CLAIMANT; to do so would go against general principles interpreting arbitration clauses; and the sugar dispute may easily be settled in Port Hope, as agreed upon by the parties. (*See New York Convention*, Art. V(1)(c)).

84. CLAIMANT was unaware of RESPONDENT'S potential counterclaim regarding the Sugar Contract when the Tribunal made CLAIMANT aware of the change in Rules from the CCIG Rules to the Swiss Rules. If it had been aware, it likely would have consented only if the arbitration was solely regarding the Cocoa Contract.

85. This tribunal should recognize the policy of avoiding unfair surprise. CLAIMANT had no knowledge that the Swiss Rules would apply to the sugar contract; therefore, this tribunal should apply nothing other than the rules agreed upon in the arbitration clause—the Rules of Arbitration of the Oceania Commodity Association. (Respondent's Exhibit No. 4). The sugar contract specifically called for application of those rules in case of a dispute. The lack of notice to CLAIMANT regarding the applicable rules in the sugar contract would lead to an unfair imposition on CLAIMANT'S case in the sugar dispute.

86. The original intentions of the parties should be honored in this contract dispute. The tribunal should only impose upon the parties that which they already agreed upon. Any contract should be revised only so far as it can be done without prejudice to the rights of the interested parties that were acquired in good faith. Here, using the Swiss rules regarding the sugar contract would unduly prejudice the rights of CLAIMANT.

87. Of course, if the counterclaim arose out of the instant matter or the applicable contract contained no forum-selection clause, this Tribunal could exercise jurisdiction, but to do so in this case would tread upon the right of CLAIMANT to have the arbitration heard in the agreed-upon forum—especially with regard to such an important disagreement.

B. If the Tribunal does have jurisdiction, it would be only to consider RESPONDENT'S assertions as a set-off defense, rather than as a counterclaim

88. RESPONDENT claims that the counterclaim filed is proper for the Tribunal to hear due to Art. 21(5)—that the counterclaim is a set-off defense as contemplated by the Rule. (Answer and Counter-Claim, para. 17). However, if this Tribunal has jurisdiction, than it is only to hear a "set-off defense." (*Swiss Rules*, Art. 21(5)). According to the Swiss Rules, the tribunal can consider claims for the purpose of a set-off even if the claim is not included in the arbitration agreement covering the principal claim. (*Id.*; *see* United Nations Commission on International Trade Law, Note by the Secretariat, 1999).

89. Art. 19 deals with counterclaims and "claim[s] relied on for the purpose of a set-off" filed by RESPONDENT, detailing what should be included in those documents. (*Swiss Rules*, Art. 19(3)). Art. 21, which deals with jurisdiction, specifically notes that the "arbitral tribunal shall have jurisdiction to hear a set-off defense," making no mention of counterclaims, much less counterclaims arising out of another arbitration clause. (*Swiss Rules*, Art. 21(5)).

90. The provision implicitly denies jurisdiction over counterclaims standing alone (i.e. not used solely as a set-off defense), "when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause." (*Swiss Rules*, Art. 21(5)). The dispute over the sugar contract is neither within the scope of the arbitration clause of the cocoa contract nor within the intended scope of the submission for arbitration by the CLAIMANT. At most, the sugar contract may be considered as a set-off.

91. Other law on international commercial arbitration supports CLAIMANT's position. The commentary on the draft text of The UNCITRAL Model Law on International Commercial Arbitration states that, if the respondent introduces a claim for the purpose of a set-off, the claim must not surpass the scope of the arbitration agreement. (United Nations Commission on International Trade Law, Note by the Secretariat, 1999). Article 27 of the International Arbitration Rules of the Zurich Chamber of Commerce (1989) provides that the arbitral tribunal has jurisdiction over a set-off defense, not a counterclaim, if the claim that is set off does not fall under the arbitration clause. (*See also* United Nations Commission on International Trade Law, Note by the Secretariat, 1999).

92. The UNCITRAL Arbitration Rules do not state expressly that the set-off claim must be covered by the same arbitration agreement as the primary claim. It is possible that both the principal claim and the claim invoked for the purpose of a set-off may be covered by different arbitration agreements. Even if the arbitration agreement covering the principal claim does not involve the set-off claim, the tribunal can determine whether it has the competence to consider the set-off claim. (United Nations Commission on International Trade Law, Note by the Secretariat, 1999).

93. Although the economic difference between considering a matter as a counterclaim or as a set-off defense is customarily minimal, in this case there is a potentially great difference between the monetary judgments sought by the parties as a result of the disputes over the contracts. The CLAIMANT did not intend to arbitrate two such weighty matters as this as separate claims in one arbitral proceeding. CLAIMANT should not be required to treat RESPONDENT'S counterclaim as anything more than a set-off defense.

94. RESPONDENT'S counterclaim, if treated as a set-off defense, would serve as an equitable defense against CLAIMANT'S case. Considering the counterclaim as a counterclaim would

prolong the proceeding. The result of including a counterclaim is separate judgments for each party, whereas a single judgment only is issued when set-off is pleaded. In turn, this single judgment limitation would promote the efficiency of the entire arbitration proceedings.

95. Of course, if the counterclaim arose out of the matter being arbitrated—the Cocoa Contract—the Tribunal would be empowered to hear the counterclaim in full. Here, though, if the Tribunal has jurisdiction to hear RESPONDENT's counterclaim, it should only consider the claim as a set-off defense to the initial claim regarding the Cocoa Contract, not as an independent matter to be arbitrated.

C. If the Tribunal does have jurisdiction, CLAIMANT is not required to pay for the sugar because it was unfit for human consumption when it was delivered

96. This issue revolves around who bore the risk of loss at the time the sugar deteriorated. The merits of this issue will be addressed at a later arbitral proceeding.

97. The cocoa contract between the parties specifically called for arbitration proceedings to be handled by the Arbitration Rules of the Chamber of Commerce and Industry of Geneva. Since the Swiss Chamber of Arbitration implemented new arbitration rules on January 1, 2004, these rules would be applicable in the claim against RESPONDENT. In contrast, the sugar contract selected, should the need for arbitration arise, an arbitral tribunal in Port Hope, Oceania to sit in accordance with the Rules of Arbitration of the Oceania Commodity Association.

98. Since the sugar contract did not decide on the Swiss Chamber as the arbitral tribunal, the new Swiss Rules of International Arbitration that apply in the cocoa contract cannot apply to the counterclaim.

99. If the tribunal finds jurisdiction over the counterclaim under the Swiss rules, RESPONDENT'S recovery is limited to set-off. The Swiss Rules of International Arbitration allows only for a set-off defense under Article 21 (5).

For Mediterraneo Confectionary Associates, Inc.

(signed)_____

9 December 2004