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

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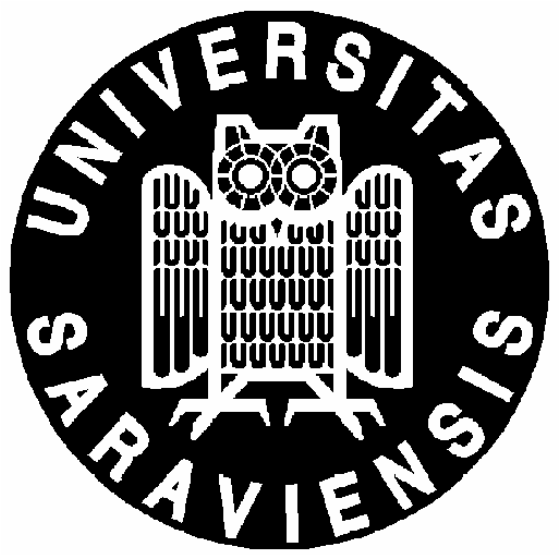
# MEMORANDUM FOR CLAIMANT




# UNIVERSITY OF SAARLAND

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CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA

**Case No. Vis Moot 11**

# MEMORANDUM FOR CLAIMANT

**ON BEHALF OF:**

**Mediterrano Confectionary Associates, Inc.**
121 Sweet Street
Capitol City
Mediterrano

(**CLAIMANT**)

**AGAINST:**

**Equatoriana Commodity Exporters, S.A.**
325 Commodities Avenue
Port City
Equatoriana

(**RESPONDENT**)

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# INDEX OF ABBREVIATIONS

| | |
|---|---|
| AG | Amtsgericht (German Petty District Court) |
| Art. | Article |
| Artt. | Articles |
| BGH | Bundesgerichtshof (German Federal Supreme Court) |
| CA | Cour d'appel (French Appeal Court) |
| 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) |
| et seq. | the following (sequential) |
| FOB | Free On Board (INCOTERM) |
| 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 |
| LG | Landgericht (German Regional Court) |
| Ltd. | Limited |
| Model Law | UNCITRAL Model Law on International Commercial Arbitration 1985 |
| 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 |
| Organisation | Equatoriana Government Cocoa Marketing Organisation |
| p. | page |

| | |
|---|---|
| pp. | pages |
| para. | Paragraph |
| 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 |

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# STATEMENT OF FACTS

## 2001

**19 November** RESPONDENT, through Mr. Harold Smart CLAIMANT, represented by. Mr. James Sweet to sell cocoa. Agreement over delivery of 400 metric tons of cocoa beans to CLAIMANT. Delivery date to be fixed during January to February, delivery to be within the months of March and May 2002. Total contract price for 400 metric tons (hereafter referred to as tons) was USD 496,299.55.

RESPONDENT sends confirmation per fax (CLAIMANT's Exhibit No. 1). A copy is also sent per post adding a written copy of cocoa contract 1045 (CLAIMANT's Exhibit No. 2).

## 2002

**14 February** Storm hits cocoa producing area in Equatoriana

**24 February** RESPONDENT informs CLAIMANT (CLAIMANT's Exhibit No. 3) of the storm and an announcement from the Equatoriana Government Cocoa Marketing Organization (hereinafter: EGCMO) prohibiting the release of cocoa for export through to at least the month of March.

**5 March** CLAIMANT replies to RESPONDENT indicating the source of the cocoa to be irrelevant to CLAIMANT.

CLAIMANT informs RESPONDENT (CLAIMANT's Exhibit No. 4) of lack of immediate pressure to receive the cocoa presently, however, later in the year, indicating the possibility of a cover purchase and consequently reimbursement for any additional costs.

| | |
|---|---|
| **Between 5 March and 10 April** | Several telephone calls by CLAIMANT asking RESPONDENT to fix a delivery date |
| **10 April** | CLAIMANT notifies RESPONDENT of expectation of cocoa delivery by the end of May (CLAIMANT's Exhibit No. 5). |
| **7 May** | RESPONDENT indicates shipment of 100 tons of cocoa would later that month (CLAIMANT's Exhibit No. 6). |
| **18 May** | 100 tons of cocoa received and paid for by CLAIMANT. |
| **June – July** | Numerous calls made by CLAIMANT inquiring as to date of shipment for remainder. |
| **15 August** | CLAIMANT informs of need for remaining cocoa soon, or otherwise a cover purchase with RESPONDENT liable for any incurred expenses (CLAIMANT's Exhibit No. 7). |
| **24 October** | CLAIMANT purchases 300 tons of cocoa from OCEANIA PRODUCE LTD. |
| **25 October** | CLAIMANT notifies RESPONDENT of purchase and its intention to claim expenses (CLAIMANT's Exhibit No. 8). |
| **11 November** | Claim sent by counsel for CLAIMANT (CLAIMANT's Exhibit No. 9). |
| **13 November** | RESPONDENT sends letter to CLAIMANT, purporting to have been prepared to deliver the 300 tons of cocoa within the next several weeks (CLAIMANT's Exhibit No. 10). |
| | RESPONDENT claims the coca contract 1045 (hereinafter referred to as contract) had not been terminated by CLAIMANT and that the |

CLAIMANT had breached the contract by making the cover purchase. RESPONDENT refuses to pay expenses claimant by CLAIMANT.

**15 November** Counsel for the CLAIMANT formally avoids the contract (CLAIMANT's Exhibit No. 11).

## 2004

**5 July** Notice of Arbitration received by Chamber of Commerce and Industry of Geneva (hereafter referred to as CCIG).

**6 July** Receipt of Notice of Arbitration sent by counsel for CLAIMANT acknowledged by Daniela Jobin on behalf of the CCIG.

**12 July** Counsel for CLAIMANT informs Daniela Jobin that a transfer of CHF 4.500 for registration fee has been made into the account of CCIG.

**15 July** Registration fee received by CCIG.

**16 July** Daniela Jobin acknowledges receipt of registration fee and encloses Notice of Arbitration for RESPONDENT.

Parties informed of the new Swiss Rules of International Arbitration (hereafter referred to as Swiss Rules).

**21 July** Counsel for CLAIMANT sends letter to Daniela Jobin, indicating a preference to have three arbitrators and follow the procedure in Article 8 of the Swiss Rules to appoint of the three arbitrators.

**10 August** Counsel for RESPONDENT sends Daniela Jobin an acknowledge of receipt of the letter sent 16 July 2004 and encloses an Answer to the claim bought by CLAIMANT as well as a counter claim bought by the RESPONDENT. Counsel for RESPONDENT also indicates preference for three arbitrators.

| | |
|---|---|
| **12 August** | Letter from counsel for RESPONDENT received by CCIG. |
| **13 August** | CCIG acknowledge receipt of Answer to the Notice of arbitration and Counterclaim by RESPONDENT. |
| **31 August** | Counsel for CLAIMANT sends an acknowledgement of receipt of Answer and Counterclaim by RESPONDENT and encloses an answer to the Counterclaim.<br><br>CLAIMANT nominates Dr CLAIMANT Arbitrator as arbitrator. |
| **31 August** | Counsel for RESPONDANT informs Daniela Jobin of RESPONDENT'S nominated Arbitrator, Mr RESPONDENT Arbitrator. |
| **3 September** | Daniela Jobin notifies Dr CLAIMANT Arbitrator that he/she has been designated Arbitrator by the CLAIMANT. |
| **6 September** | Dr CLAIMANT Arbitrator sends acknowledgement to Daniela Jobin and accepts nomination. |
| **13 September** | Daniela Jobin notifies both parties that the Arbitration Committee has confirmed them as co-arbitrators and encloses respective copies of the statements of independence. |
| **16 September** | Dr CLAIMANT Arbitrator sends a letter to Daniela Jobin confirming that he/she, along with Mr RESPONDENT Arbitrator, have designated Professor Presiding Arbitrator as the presiding arbitrator, who has agreed to arbitrate. |

**22 September** Daniela Jobin confirms Prof. Presiding Arbitrator as Chairman of the arbitral tribunal and provides all arbitrators with all relevant documents.

## SUBMISSIONS

In view of the above facts and in response to Procedural Order No. 2, we respectfully make the
following submissions on behalf of our client, Mediterraneo Inc. (CLAIMANT):

That there is no jurisdiction to decide on the sugar contract. That the claim arising out of the sugar contract is unrelated. That the claim is a counterclaim.

The embargo was not an impediment that prevented the RESPONDENT fulfilling his obligations under the contract.

The delay in delivery constituted a fundamental breach by the RESPONDENT, which entitled the CLAIMANT to avoid the contract.

The CLAIMANT is entitled to USD 289,353 in damages for the price difference between the contract price and the price of the cover purchase.

_____
Signature (Counsel)

1.

**1. The Swiss Rules effective November 01, 01, are applicable to this arbitration, due to party autonomy and the rules applicable to international law**

The Swiss Rules effective November 1, 01, are applicable to this arbitration. This is the case for two reasons: 1st, the parties decided to employ the rules applicable on the date of signature, 2nd, referring to a set of rules not in effect at the time, known as dynamic reference, is considered inappropriate in international law.

2.

**a. Party intention is directed at referring to the Swiss rules in effect on November 01, 01**

First, the parties concluded the contract, which contained the arbitration clause, on November 1, 01, referring to the Swiss Rules as the procedural rules applicable to any arbitration in connection with the contract. Not only in German arbitration(s) (clauses) do the parties refer to a set of rules as they are applicable on date of signature (See: OLG Hamburg, 03-09-82 (VersR 83, 299); or: Schwab / Walter, p.155 (2000); or on the international level: Craig/ Park/ Paulson, International Chamber of Commerce Arbitration, p. 5 (1983)). Maintaining a connection to the rules as applicable on the date of signature is only appropriate, since there are elements of unforseeability of changes in the respective rules in play. Parties avoid unforseeability in contracts, and prefer to know the details, in order to calculate their risks more exactly and appropriately. The Parties here would have had to anticipate at the outset any changes occurring during the duration of the contract to effectively refer to the rules currently in effect. Even if some changes were anticipated, no drastic change in party autonomy, as they occurred here, like number of arbitrators and enlarged jurisdiction, could have been foreseen.

3.

After the contract in question was agreed upon on the 19.11.01 the Swiss Chambers of Commerce unified their rules in 2003, which entered into force on 01.01.04. With the introduction of Art. 21V it is now possible to combine unrelated claims in a single proceeding. While other arbitration procedures allow for enlarged jurisdiction, like the Swiss rules now contain, the parties did not choose such a road of enlarged jurisdiction but referred to a set of rules with jurisdiction limits set more narrowly.

4.

Beside (important) aspect of party intention, it was unforeseeable that the Swiss rules would change so dramatically or even surprisingly. Surprising clauses according to an agreed general and international law practice invalid the offending clause. Underlining this practice the Swiss Federal Tribunal in it's decision of the 14.06.90, (Komplex v. Voest-Alpine Stahl, cited on p. 3, Scherer, New rules on international arbitration in Switzerland, International Arbitration Law Review, 2004) forced the ICC to apply an old version of the ICC procedural rules the parties had agreed on due to the revised rules in force while the procedure took place incorporated structural and fundamental changes giving the new rule a character of surprising clauses.

5.

Contrary to what has been argued and occasionally - but not without critics - been decided (See: in Germany: OLG München, 01-08-84 (KTS 85, 155ff)) and to what the Art.1 III asserts by stating "unless the parties have agreed otherwise", the parties do not have to express their wish to exclude a dynamic reference by e.g. specifying in their arbitration clause to (the set of) rules "in effect" or to (the set of) rules "in the version of a specific date". This becomes clear, when compared with the UNCITRAL model rules of 1976, in which the revisionists of the new Swiss rules base their work on (See: Scherer, p. 1) and which, in it's model arbitration clause, does not express a need to refer to a specific version of the applicable procedural rules. It therefore doesn't seem to be necessary – even if it may be useful - to do so in order to prevent any problems arising out of the question which version of a set of rules does apply. "The decision on the applicable rules will be a matter of interpretation of the agreement"(See: Scherer, p.3) the only way these new rules applied would be now a separate party agreement (party autonomy) to change the scope of the clause admitting the new rules to apply but there seems no way, the claimant would agree to that, he actually did object to this in the answer to the counterclaim 31-08-04 (Paragraph 4). Thus, no dynamic reference was intended and the Swiss rules applicable on November 1, 01, must be considered the procedural rules for this arbitration.

6.

**b. The Rules effective November 01, 01, apply, because dynamic reference is not an acceptable option for arbitral clauses**

Secondly, dynamic reference is not a valid choice for arbitral proceedings. Already the renovators of the ICC-Rules in 1975 have seen the possibility of resolving the problem of "a

conflict of rules in time" including a legislative drafting technique/ a dynamic reference and did expressively decide against this option ( See: Craig/ Park/ Paulson, p.4)! This is so specifically because all contracts require certainty of terms, the terms of a dynamic reference are not certain at the time and may even at the expiration of the contract not be certain. Furthermore, although it has been argued that dynamic reference is necessary for practicability, it is not so in this case. The main argument for practicability is that it would be necessary for the arbitrators to decide a case according to law that is no longer applied. However, the Swiss rules in effect on November 1, 01, are still applied today. It seems obvious that today, not even a year after the new rules came into effect on 01.01.04, cases applying the old rules are still pending. If the old rules are still in use they could be applied without the need to construe dead rules. Without such need, the argument of practicability turns to dust. Thus, the rules effective on November 01, 01, apply to the contract.

7.

**2. Even if the current Swiss Rules are applied, jurisdiction of this panel over RESPONDENT's claim is excluded**

**a. The Jurisdictional Rules are dispositive**

Arguendo this panel decides against the application of the proper rules, effective November 1, 01, the Swiss Rule's jurisdictional aspects are mainly dispositive, and do not require application. They should not be applied in this arbitration due to party agreement. It is internationally recognized, that the parties have freedom of contract and that this "principle of autonomie des conventions" ( Naón, Choice of Law Problems in International Commercial Arbitration, p.30 (92)) or party autonomy is even "wider" (Naón, cited before) in (international) arbitrary law, which the pure existence of arbitrary litigation which could not exist without the parties submitting their dispute to an arbitrary panel rather than any national court explains. An illustrative example for this aspect is the fact that contrary to any national proceeding the parties of an arbitration in international (Art. 33 II UNCITRAL) - as in most national - (e.g. §1051 III ZPO) arbitrary procedures even have the power to designate the arbitrators as "amiable compositeurs" (See: Kröll, Ergänzung und Anpassung von Verträgen durch Schiedsgerichte, p.212f (1997/98)) who are able to decide the case on the only grounds of equity. Parties can decide about the content of their contracts.

8.

The Swiss rules, in accordance with the internationally recognized freedom of contract, allow for modification of the rules by party agreement. While no specific article allows for modification, in practice, modifications have been implemented even within the limited framework of this very arbitration.

9.

First, the seat of the arbitration was changed. According to the rules, the seat must be located in Switzerland, however, the panel will be located in Danubia, as the parties had agreed upon when inserting the arbitral clause contrary to what the Swiss rules were determined before the 05-07-04 which is the date of submission of the request for arbitration and the date on which the arbitration proceedings are said to commence (Art.3 II Swiss Rules) and the date on which the applicable version of the procedural rules latest must be fixed. Any changes of the rules afterwards cannot affect the arbitration process. Still, only the day after the request for arbitration was received by the Geneva chamber, on the 06-07-04 did the chamber decide to enlarge the Art.1 II Swiss Rules allowing the seat of arbitration to be outside Switzerland. The parties therefore changed by their own agreement the rules before such change became permissible on 06-07-04 applying to their dispute (See: the correspondence between the parties and the Geneva chamber of the 06-07-04 and 12-07-04, in the problem, p. 19, 21).

10.

Second, the number of arbitrators was agreed to be three, rather than one, as specified in the arbitration clause. Using the rules, there should be a single arbitrator; however, the parties had previously agreed on a panel of three and have been able to select three arbitrators in spite of the rules which seek to have only one arbitrator for expedited procedures. The Swiss rules can therefore be modified by party agreement.

11.

**b. The parties excluded jurisdiction outside their arbitration clause**

Through determining the scope of their arbitration clause, the parties expressly modified any terms of the rules to exclude any jurisdiction of the panel outside the already broad scope of the arbitration clause. Art. 21V, which is, by its terms, contrary to the agreement of the parties, has been therefore excluded by the parties. Art. 21V allows for inclusion of unrelated set-off claims. While set-offs are not per-se excluded by the arbitration clause, unrelated claims, i.e. claims not related to or arising out of the contract, are prohibited.

”The possibility of filing a counter-claim with the Court of Arbitration will depend on the contents of the arbitration agreement; as a rule it will be admissible if it concerns the same legal relation indicated in the arbitration clause as the main action.” (See: Bachmann, Switzerland: the Court of Arbitration of the Zurich Chamber of Commerce, p.215 (1977)). An unrelated set-off cannot arise out of or be related to this contract. Even though the parties could not have known that an article like 21V by number or content would become part of the rules, the scope of the clause was important enough for the parties to specify in their rather short agreement. Regardless of the jurisdictional scope specified in the former Swiss rules, the parties wanted to ensure, that their choice of jurisdictional scope was secured. Parties agreeing to the arbitration clause, specify scope of jurisdiction given to the arbitral panel.

12.

The contractual agreement provides for jurisdiction for claims that are: “Any dispute arising with respect to or in connection with this agreement . . . ”. The plain meaning of the arbitration clause thus excludes claims not arising out of or related to the cocoa contract here in question. Whether one adheres to dynamic reference or not, the parties did not depend on the rules for the scope but limited the applicability by modification of the rules at the outset. Another proof that the parties did not intend to have other contracts included in this case is that the sugar contract has its own arbitration clause. This indicates that the parties did not want the Swiss rules in the current form. Thus, the Swiss rules can be and have been modified to exclude Art. 21V by these parties.

13.

### 3. Jurisdiction does not lie with the panel because RESPONDENT’s claim is an unrelated counterclaim

Arguendo, the Swiss rules apply in their entirety including Art. 21V, respondent is propounding an unrelated counterclaim, rather than a set-off defence covered in Art. 21V. The plain meaning of Art. 21V refers only to set-offs. Ordinarily, panels decide the legal aspects arising out of one transaction or assurances. It is quite possible, that there is more than one contract involved, however, they would usually show a certain close relation.

14.

#### a. RESPONDENT’s claim is unrelated to the contract

The two claims are completely unrelated, the only connecting factor are the parties. The contract subject matter concerns two different commodities, one is sugar, the other cocoa. Further, it is unrelated because it has been formed at a later time, not in quick succession. At

the time of formation of the cocoa contract, the parties could not anticipate the later sugar contract of 20-11-03, whereas, they could have made reference in the sugar contract to the cocoa contract. Using the same arbitration clause would have been an indication; however, the second contract contains a separate arbitration clause, with different location and procedure. This different clause was chosen for the expertise that is to be found in Oceania Commodity Association (See: the claimants exhibit of 31-08-04, p.40). This panel deciding the case, would destroy the choice of the parties to make use of special expertise, a choice which is objectively sensible. Unrelated claims are not to be decided in one case. However, according to the Swiss rules, unrelated defences are allowed in narrow circumstances, when the defence is an unrelated set-off.

15.

**b. RESPONDENT's claim is a counterclaim rather than a set-off**

In this case, the defence is a counterclaim, not a set-off. A set-off is principally a claim for money owned by the debtor against the claimant who sues on a different monetary obligation. The two claims are to be off set against one another, to cancel each other. Therefore, a set off never exceeds the amount of the original claim. A counterclaim is an independent claim which can be brought to court independently, but may be raised as defence to an existing proceeding.

16.

There are several reasons why this claim is a counterclaim rather than a set-off. The first reasons for defining the claim as a counterclaim is that in RESPONDENT terms it's claim is a counterclaim, not a set-off. Logically, respondent means what they say and counterclaim means counterclaim, not set- off. According to general principles of civil law, the parties are autonomous in the proceeding and if a party chooses a procedural defensive tool over another, the panel is bound to that choice.

17.

Second, respondent is quite correct in asserting this claim as counterclaim. The reason for this claim to be a counterclaim lies within the very nature of the distinction between counterclaim and set-off. The amount RESPONDENT claims in front of this panel remains the decisive factor. In the correspondence of 10.08.04 (See: p. 30 of the problem) RESPONDENT requests the panel to find "That Mediterraneo Confectionary Associates, Inc. is obligated to pay the full contract price of USD 385, 805". This means that

RESPONDENT's claim arising out of the sugar contract surpasses the amount in controversy of the originating claim, totalling USD 289,353, the cocoa- contract of the proceeding, according to what the Geneva Arbitration Chamber on the 15-07-04 (See: p. 21 of the problem) considered as amount in dispute. However a set-off defence - as said above – is due to its very nature and in contrast to a counterclaim, limited to the amount in controversy of the originating claim. Only in terms of an independent counter-claim could RESPONDENT claim a sum in excess of the sum sued for by the CLAIMANT.

18.

Thus, Art. 21 V of the Swiss rules does not apply. There is no statement that counterclaims can be unrelated to the claim to merit jurisdiction of the arbitral panel. This claim however is unrelated to the contract in question. It also has a separate arbitration clause and was concluded after the cocoa contract, so that inclusion in this arbitration proceeding would not have been foreseeable. In accordance with the provisions of Art. 21 I the panel must decide its own lack of jurisdiction over the counterclaim arising out of the sugar contract.

19.

**4. RESPONDENT's counterclaim is not included in the jurisdiction of the panel, because exorbitant jurisdiction is to be interpreted narrowly**

**a. The plain meaning of the text excludes RESPONDENT's counterclaim**

Art. 21 V is not applicable, because it is an unrelated counterclaim. Art. 21 V by its plain meaning refers to set offs only. Art. 21 V is an exorbitant jurisdiction to the regular limits. This article has to be interpreted narrowly, for set offs only.

20.

**b. The system of the Swiss Rules speaks against application of Art. 21 V in this case**

This can be derived from the systematic order of the Swiss rules. First, extension of jurisdiction in Art. 21 V is an exception to the rule that the panel's jurisdiction is limited by party intention and the arbitration clause. In general, exceptions are to be interpreted narrowly. Otherwise the rule would become obsolete, which cannot be the case. Thus the exception provided by Art. 21V, referring only to unrelated set-offs, cannot be widened over and above the plain meaning of the text, in order to give the panel additional jurisdiction over

unrelated counter-claims. In short, the panel should not rule on the substantive claim arising out of the unrelated sugar contract, as this would mean extending jurisdiction beyond measure.

21.

Second, a narrow interpretation of exorbitant jurisdiction given to the panel by Art.21V can be deduced from the similar practice of the Swiss rules when consolidating two claims. Proper jurisdiction is needed for both claims. According to Art.4 I of the Swiss Rules, the Chambers may decide after consultation with the parties and of the Chambers' Special Committee to consolidate two arbitrations among the same parties and to refer the second dispute to the arbitral tribunal constituted in the first dispute. The same provision also allows for proceedings to be consolidated which are not between the same parties and, as it appears from the wording of the provision, not even under the same contract, BUT the second arbitration must also be based on an arbitration agreement providing for arbitration under the Swiss Rules or their predecessors. The Chambers shall take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings."

22.

Allowing a claim and a counterclaim to be considered in the same proceeding is – whether the claims are related or as it is the case here, unrelated – a similar case to the one of claim-consolidation discussed before. In both situations the arbitration tribunal is confronted with two claims (See: Berger, Die Aufrechnung im Internationalen Schiedsverfahren, p. 426, 430 (RIW 98)). If this is so, there is no reason to be more lenient in accepting a counterclaim to be brought in front of the panel than in consolidating two claims. Thus the strict prerequisites, which apply according to Art.4 I Swiss Rules in the case of consolidation of two claims cannot be extended or even ignored when deciding the question whether a counterclaim is to be considered in the same proceeding as the main claim. The prerequisites of Art.4 I Swiss Rules are, however, not fulfilled by the RESPONDENT's counterclaim based on the sugar-contract. There is neither a party agreement on accepting this unrelated counterclaim, nor do the two contracts contain an identical arbitration clause and at last, the counterclaim is completely unrelated. An analogy of Art.4 I Swiss rules to a counterclaim seems to underline only the view that the rules in their entirety do not support any exorbitant jurisdiction outside the exceptionally rule of Art.21 V but concern only unrelated set-offs and not as it is the case here, unrelated counter-claims.

23.

**c. International harmonization is thwarted by use of exorbitant jurisdiction in this case**

Many jurisdictions and arbitration rules do not allow exorbitant jurisdiction at all and would refuse to apply Art. 21V. There is no international practice which would support the application of Art.21V Swiss rules as to this arbitration. The UNCITRAL model arbitration rules reflect - an -if not mandatory nonetheless important- model set of rules. UNCITRAL was created on the mere existence on an international agreement of how to hold an international arbitral proceeding. It only allows defences that are related closely to the original claim: "a counterclaim arising out of the same contract, or a claim arising out of the same contract for the purpose of a set-off."(Art. 19 III UNCITRAL). If accepted at all, unrelated defences are thus in international practice, to be used and allowed only in narrow limits. A broad interpretation of rules such as the Art.21 V Swiss Rules which gives the panel not only extraordinary but exorbitant jurisdiction as it is in a similar case often said from the Art. 23 of German Rules for civil proceedings (ZPO") (See: Rüßmann, Die internationale Zuständigkeit für Widerklage und Prozeßaufrechnung, p. 463). The consequences could be that an arbitral award which is awarded internationally cannot be accepted in legal systems such as the German one (See: Berger, p. 429 or: BGH, the –still – leading decision of 22-11-1962, p.245 (BGHZ 38, 254)) which cling on the more restrictive rules for defences in arbitral proceedings as the UNCITRAL is propounding. Because there would be insufferably large differences internationally, if this jurisdiction was construed widely, harmonization of international law would suffer. Any international practice speaks hereafter against an application of Art. 21V Swiss rules.

24.

**d. Allowing RESPONDENT's claim would not further the goal of the Swiss Rule Art. 21 V**

Even if it is an unrelated set-off, which is allowed under the rules, the intended effect of allowing a set –off is not realized. The intended effect was to streamline the process and stay abuse of Swiss procedural rules, which provided for a stay of the entire proceeding to wait for the decision on the unrelated set off defence (See: Mealey's International Arbitration Report, Vol. 19 No. 6, p.5, June 2004). The intended effect was to allow a panel to decide the material claim without waiting on a different court to decide the set-off. The amount in controversy arising out of the sugar contract here is higher than the amount in controversy

arising out of the main, cocoa, claim. This means, that the set off could only be decided up to the amount of the cocoa claim and the remainder of the sugar claim would have to be decided by a separate panel. We thus would need two proceedings regardless and the goal of allowing the unrelated set off would not be realized. The process is not streamlined to the extent that still two proceedings need to occur. For this proceeding here in question however, there is no waiting period even if the Art. 21V Swiss rules wouldn't be applied.

25.

If the Panel decides that the Swiss Rules must be applied in their entirety, and Art. 21V is mandatory, the parties have - for all reasons seen above – made an invalid choice (by referring to the Swiss rules without specifying the applicable version nor excluding provisions with the invalid content of Art. 21V) of procedure and this part of the arbitration clause is thus invalid.

26.

**5. The procedural rules of the seat should apply in this case**

As shown supra, the parties did not intend neither a dynamic reference nor its effects in the case which means the applicability of Art.21 V of the new Swiss rules. As such, the will of the parties must be respected and the arbitration clause itself invalidated. Assuming one adheres to the theory concerning dynamic reference in the first place. If the parties do not agree ad hoc on an acceptable procedure, which seems to be the case, and if the choice of rules clause is invalid, internationally recognized default rules such as lex mercatoria must apply (See: Naón, p. 26, 27, 30 (1992)). This way neither party is disadvantaged, treated unfairly. This choice would be rather practical because these default rules as opposed to ad hoc rules are tried and true. International Law requires the rules of the seat country to apply (See: Walter/ Boesch/ Bröminmann, Internationale Schiedsgerichtsbarkeit in der Schweiz, Kommentar des Kapitel 12 IPRG, p.75 (1995)). The seat country in this case is Danubia which has fully adopted the UNCITRAL Rules to govern any international arbitral proceeding (See: Bergsten, Ten Years of the International Commercial Arbitration Moot, p.2 (International Arbitration Law Review 2003)) .

27.

The applicable procedural rules for the arbitration concerning the main claim out of the cocoa-contract are in spite of the invalid provisions made by the arbitration clause of the mentioned cocoa-contract not the Swiss Rules in either version but only the UNCITRAL rules as they have been adopted by the law of the seat-country, Danubia.

28.

RESPONDENT's defence claim whether it is an counterclaim or not does not fall in the jurisdictional power of the arbitral panel deciding the main claim simply because of it's lack of relation to the latter. The UNCITRAL rules as they are applicable in this case do not, as seen above and in contrary of the Swiss rules and their Art. 21V, allow any unrelated defences to be brought up in an actual arbitral proceeding.

29.

**6. The content of the cocoa contract 1045**

The contract was for 400 tons of cocoa to be delivered to the CLAIMANT between the months of March and May 2002. The actual delivery date and number of installments within this time was at the RESPONDENT's option, upon notice of the CLAIMANT during the months of January and February 2002.

30.

The cocoa was to be of standard grade and count in Equatoriana, but the contract did not state that the cocoa had to come from Equatoriana. It was never agreed by the parties that the cocoa should come from Equatoriana and there is no reason why the CLAIMANT would favor cocoa from Equatoriana over cocoa of the same grade and count.

That the cocoa delivered to the CLAIMANT in the past was always from Equatoriana is merely coincidental. This never formed part of the contractual agreement.

31.

**7. The RESPONDENT is not exempt from paying damages under Art. 79 CISG**

The embargo does not constitute a force majeur in accordance with Art. 79 (1) CISG. The RESPONDENT is not exempt from paying damages in accordance with Art. 45 (1) (b) CISG in conjunction with Arts. 74 to 77 CISG.

32.

The RESPONDENT cannot prove that the late or non-delivery of the cocoa was due to an impediment beyond his control. Furthermore, the RESPONDENT could have reasonably expected to have taken this alleged impediment into account at the time of the conclusion of the contract and could have avoided it or its consequences [Secretariat commentary].

33.

**a. No impediment to performance existed**

There has to be an impediment to due performance. Impediment should be taken to mean that performance has been rendered impossible and not merely onerous [Hudson]. In the case "*Nuova Fucinati S.p.A. v. Fondametall International A.B.*" the Italian *Tribunale de Monza* found that Art. 79 CISG would not excuse a party unless performance had become impossible.

34.

The ability of the RESPONDENT to perform was not impossible. As discussed above the contract only required cocoa of a specific grade. It did not require the cocoa to be from Equatoriana. As the RESPONDENT could have found cocoa from other sources, no impediment to performance existed.

35.

**b. The impediment was not beyond the RESPONDENT's control**

If the Tribunal are of the opinion that an impediment arose, it is argued that the impediment was not beyond the RESPONDENT's control. This requirement is based on the assumption that there is a typical sphere of control: a sphere within which it is objectively possible for, and can be expected of, the promisor to be in control. The RESPONDENT is always responsible for impediments that he could have prevented but, despite his control over preparation, organisation, and execution, failed to do so [Southerington].

36.

It was possible for the RESPONDENT to apply for an exemption against the ban [Procedural Order No. 2, p. 56] . The RESPONDENT did not do so. Arguably, if the RESPONDENT had tried it may have been successful in receiving an exemption. Therefore, it is argued that the alleged impediment was within the control of the RESPONDENT.

37.

Additionally, as discussed below the burden of proof is on the RESPODENT to prove all elements of this test have been fulfilled. The RESPONDENT cannot prove that an application for an exemption would have failed. That no other companies were successful in receiving an exemption is not conclusive evidence that the RESPONDENT would not have been successful.

38.

**bb. The seller always carries the risk of non-delivery of his supplier**

The RESPONDENT must always carry the risk of failure by his supplier [Schiedsgericht der Handelskammer Hamburg, 21 March 1996]. When the RESPONDENT receives an order for cocoa it places an order of cocoa with the Organisation for an equivalent amount. In this sense, the Organisation acts as a supplier for the RESPONDENT.

39.

The RESPONDENT assumes the risk of the failure or inability of a supplier to supply the contracted goods [OLG-Rp Hamburg (1997) 149-152]. Therefore, that the Organisation did not supply the RESPONDENT with the necessary cocoa cannot constitute a force majeur.

40.

The onus is on the RESPONDENT to prove that there were no goods of equal or similar quality available on the market to be exempted from liability [supra]. The RESPONDENT has failed to do this and cannot be exempt from liability. As discussed above, Equatoriana was the only cocoa-producing area affected by the storm and several other countries produce cocoa at the same grade. The CLAIMANT could have purchased substitute cocoa of the same grade from a multitude of other suppliers [Procedural Order No. 2, p. 58]. Therefore, there were goods of similar quality on the market and the RESPONDENT is not exempted from his liability.

41.

**c. The RESPONDENT can reasonably be expected to have taken any alleged impediment into account at the conclusion of the contract**

That the Organisation may not have been able to supply cocoa to the RESPONDENT was a reasonably foreseeable possibility that the RESPONDENT should have been prepared for. The RESPONDENT has experience in exporting cocoa and the cocoa market. Due to the nature of the product, it would have been reasonably foreseeable to the RESPONDENT that an impediment could prevent the Organisation from supplying the cocoa. Therefore, the RESPONDENT can reasonably be expected to have taking into account an impediment preventing performance at the conclusion of the contract.

42.

**d. The RESPONDENT can reasonably be expected to have been able to avoid or overcome any alleged impediment or its consequences**

The impediment and its consequences must have been unavoidable. An impediment may be avoided or overcome, for example, by delivering a commercially reasonable substitute for the performance which was required by the contract [Southerington]. The RESPONDENT should have done all in his power to carry out his obligation [Secretariat Commentary].

43.

The RESPONDENT could have found a commercially viable substitute. As no other cocoa-producing countries were hit by the storm [Procedural Order No. 2, p. 55]. Furthermore, a number of other countries produce cocoa of the same standard as Equatoriana [supra, p. 57]. As the RESPONDENT is a trader in a number of commodities [Statement of Case, p. 2], it is submitted that finding a commercially viable substitute was well within the capabilities of the RESPONDENT.

44.

**e. Conclusion**

It is respectively submitted that there was no impediment preventing the performance of the RESPONDENT. Therefore, the RESPONDENT is not free from his obligations or subsequent liability arising from them. The CLAIMANT is entitled to claim damages in accordance with Art. 45 (1) (b) CISG in conjunction with Arts. 74 to 77 CISG.

45.

**8. The late or non-delivery of the cocoa constituted a fundamental breach of contract, which entitled the CLAIMANT to avoid the contract**

The failure by the RESPONDENT to deliver the cocoa was a fundamental breach within the meaning of Art. 25 (1) CISG. The CLAIMANT then validly and rightfully exercised his right to avoid the contract in accordance with Art. 49 (1) (a) CISG.

46.

**a. The late or non-delivery of the cocoa constituted a fundamental breach of contract**

The breach of any obligation under the contract suffices irrespective whether the duty has been specifically contracted for or followed from provisions of the convention. According

to Art. 33 (b) CISG, the RESPONDENT had to deliver the goods within the period of time fixed in the contract. In accordance with the contract, this period was to be between the months of March and May. However, The RESPONDENT did not perform this duty as he did not deliver 300 of the 400 tons of cocoa beans at all. This constituted a breach of contract.

47.

The additional requirement of the breach to be "fundamental" breach is intended to save the contract and subsequently avoid expensive and wasteful reshipment where either the defect of goods is immaterial or the deprivations from the contract are insubstantial [Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods].

48.

Non-delivery constitutes a fundamental breach [Foliopack AG v. Daniplast S.p.A.]. However, if this Tribunal decides that the breach of the RESPONDENT was a late-delivery of goods, it is argued below that this can also constitute a fundamental breach.

49.

**aa. detriment**

The breach must result in detriment to be considered as fundamental. "Detriment" has to be interpreted in a broader sense [Fundamental breach under the CISG, Alexander Lorenz, Dinslaken, Germany/Canterbury, England] to include immaterial detriments such as losing a customer, losing resale possibilities, or being brought into disrepute.

50.

As a result of the delay/non-delivery, the CLAIMANT risked running out of cocoa which would have prevented its ability to produce confectionary items which require cocoa to be made. This would have led to economic loss and also the potential loss of customers. Therefore, it is clear that this breach would have resulted in detriment. Additionally, the CLAIMANT needed to purchase a last-minute substitute at a higher market price, which also resulted in detriment.

51.

The detriment must be also substantial [Joseph Lookofsky, "Understanding of the CISG in the USA", Kluwer Law International Sale of Goods (CISG) 1995 at 70]. This depends on whether the breach can be cured without causing unreasonable inconvenience and delay [Commentary on the Draft Convention on Contracts for International Sale of Goods, prepared by the UNCITRAL Secretariat (Doc. A/ CONF. 97 / 5), Official Records, 26]. As discussed above, the CLAIMANT was forced to purchase cocoa elsewhere at a significantly

higher market price. The difference in price has to be considered as an unreasonable inconvenience and consequently the detriment is substantial.

52.

Furthermore, a breach is fundamental if the CLAIMANT would not have concluded the contract had he foreseen the breach at the conclusion of the contract [OGH 2Ob 163/97b]. The CLAIMANT would not have concluded the contract if it had foreseen this breach, as it had an interest in timely delivery.

53.

**bb. expectation component**

The CLAIMANT must have been deprived of what he was entitled to expect under the contract. The expectation of a party of a contract is an essential criterion to the determination whether a breach is fundamental [Fundamental breach under the CISG, Alexander Lorenz, Dinslaken, Germany/Canterbury, England]. The CLAIMANT was entitled to expect the timely delivery of 400 tons of cocoa within the months of May and March, as this is what was agreed between the parties.

54.

Additionally, it is submitted that, "a delay in delivery can rise to a level of fundamental breach when a timely delivery is in the special interest of the buyer." [OLG Hamburg, 1. Zivilsenat 28.02.1997, 1 U 167/95; BGer, 4C.105/2000 (Switzerland 2000)]. There was a special interest in timely delivery, as the period of delivery was included in the contract terms. Furthermore, as a company dealing principally in the production of confectionary [Statement of Facts, p. 2], it is clear that the CLAIMANT would require ingredients needed for the production of such items to continue business. The volatile nature of the cocoa market would also make it necessary for the CLAIMANT to source its ingredients in good time, thus explaining the long time period between the conclusion of the contract and the date of performance. This does not indicate that the CLAIMANT did not require the timely delivery of the cocoa.

55.

Therefore, it is submitted that the CLAIMANT expected the timely delivery of the cocoa. Additionally, the CLAIMANT had a special interest in the timely delivery of the cocoa and the delay gave rise to fundamentally breach of the contract by the RESPONDENT.

56.

**cc. Foreseeability**

For the breach to be fundamental the RESPONDENT must not have foreseen the result of the breach and a reasonable person of the same kind in the same circumstances must have also foreseen such a result. This is a subjective and objective test. It is argued that the RESPONDENT could foresee the result of its breach. Firstly, there have been a number of previous dealings between the two companies. The RESPONDENT is aware of the nature of the CLAIMANT's business and subsequently its need for the timely delivery of cocoa.

57.

The RESPONDENT would have been able to foresee that the CLAIMANT would need to purchase cocoa elsewhere in order to be able to continue manufacturing confectionaries. As the RESPONDENT has experience in the cocoa industry, he could have foreseen that due to the volatile nature of the coca market, the CLAIMANT may be forced to purchase cocoa at a higher market price. Thus, the RESPONDENT could foresee that its failure to deliver would result in a substantial detriment being incurred by the CLAIMANT.

58.

Furthermore, the CLAIMANT informed the RESPONDENT of his need for the cocoa soon or the need to seek a substitute [CLAIMANT's Exhibit No. 7, p. 13]. The Tribunal is also invited to find that a reasonable seller would have been able to foresee the same as the RESPONDENT.

59.

**dd. result**

The RESPONDENT's breach of contract is fundamental and therefore the CLAIMANT was entitled to legally avoid the contract.

60.

**9. The conduct of the CLAIMANT, namely purchasing substitute cocoa, constituted a valid avoidance of the contract**

**a. Declaration of avoidance, art. 49 (1) (a), 26 CISG**

The CLAIMANT's conduct and letter constituted rightful avoidance of the contract, subsequent to the RESPONDENT's breach. "Considering the fact that the seller had not performed its obligation to deliver the goods, the Court further held that the buyer had validly

avoided the contract (Art. 49 CISG) since the non-performance amounted to a fundamental breach of contract" [BGer, 4C.105/2000 (Switzerland 2000)]

61.

It is submitted that there is no necessity to make a formal declaration of avoidance. The contract may be implicitly avoided through the conduct of the parties [supra]. The CLAIMANT made it clear to the RESPONDENT through a number of letters and phone calls that it would need the cocoa soon and may have to purchase elsewhere. The CLAIMANT finally warned the RESPONDENT by letter [CLAIMANT's Exhibit No. 7] that it would purchase elsewhere if it did not receive notification soon. As the CLAIMANT did not hear from the RESPONDENT for six weeks after this letter, he was forced to purchase elsewhere. This conduct, along with the letter informing the RESPONDENT of the purchase [CLAIMANT's Exhibit No. 8], constitutes a valid avoidance of the contract.

62.

**10. Substitute transaction in a reasonable manner and within a reasonable time**

The CLAIMANT purchased the cocoa from Oceania as replacement goods because of the failure of the RESPONDENT to deliver. The purchase took place in a reasonable manner and a reasonable time.

63.

**a. reasonable manner**

The CLAIMANT purchased the cocoa at the end of October at the market price. The price was the market price, a purchase at the market price cannot be unreasonable, even if the market price has increased significantly [Arbitration proceeding 155/1994 (Russia 1995]. The existence of reasonableness should avoid hasty or malicious conduct [Guide to art 75, Use of Unidroit principles to help interpret art. 75 CISG]. The CLAIMANT waited six weeks after the last letter to the RESPONDENT on which no response was given. The company almost run out of stock so they definitely needed new cocoa [Procedural Order No. 2, p. 58]. The time it waited was long enough to deny hasty conduct. Therefore, the CLAIMANT purchased in a reasonable manner.

64.

**b. reasonable time**

The purchase was within a reasonable time-frame. The CLAIMANT urgently needed cocoa [supra] and could not wait until the price fell. Furthermore, the CLAIMANT could not have known whether the price would fall or not. “Therefore there is no reason why the [CLAIMANT] could not have bought substitute goods without delay, except in the case in which the [RESPONDENT could prove that the [CLAIMANT] was able to find other goods at a more favorable price.” [BGer, 4C.105/2000 (Switzerland 2000)]. “At the same time, the Seller presented no evidence that [at the time of the breach it was possible to purchase the goods at lower prices.” [Russia 6 June 2000 Arbitration proceeding]. The CLAIMANT waited for information from the RESPONDENT as to when and if he was able to deliver with no avail. Therefore, the CLAIMANT purchased within a reasonable time frame.

65.

**11. Amount of damages**

The CLAIMANT has the right to claim the difference between the contractual price and the price of the substitute transaction.

66.

**a. Sum equal to the loss**

The loss occurred is the difference in price. “In the Tribunal's opinion, the difference between the price stated in Appendix No. 1 to the Contract and the price of the goods purchased in February 1993 in substitute of the goods not delivered by the [Seller] under the above mentioned contract represents sufficient evidence of the amount of losses suffered by the [Buyer] due to the [Seller]'s breach. Besides, the Tribunal is of the opinion that in this case the [Seller] must pay such amount of damages also because at the time when the contract was made he should have foreseen any possible unfavorable consequences of not fulfilling [Seller]'s obligations. For example, he should have foreseen the increase of the world prices of the goods sold.” [Russia 6 June 2000 Arbitration proceeding 406/1998]

67.

Basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed [Secretariat Commentary on Art. 74 CISG]. The CLAIMANT would have paid the contract price and not the price of the cover purchase.

68.

Furthermore, the market price rule requires that in the case of goods of a kind available on a market, the normal measure of damages is taken to be the difference between contract price and market price [Guide to Art. 74, Comparison with PECL, Comment to PECL Article 9:502, C.]

69.

This is supported by the decision of the Supreme Court in Austria, where the court held in event of non-performance or other breach of contract, the obligee is generally justified (as long as the obligor is not entitled to cure under Art. 48 CISG) to undertake reasonable measures itself to generate a situation corresponding to proper performance and then invoice the obligor the costs as damages incurred. [Austria 14 January 2002 Supreme Court]. The CLAIMANT can claim the difference in price in accordance with Art. 74 CISG.

70.

**12. The amount of damages is not limited in accordance with Arts. 74 to 77 CISG, because the damages suffered by the CLAIMANT were foreseeable**

The damages incurred by the CLAIMANT were foreseeable at the time of the formation of the contract. The damages of USD 289,353 arose from the changes in the market price. In commercial relations increasing market prices should always be foreseeable and are in the customary margin [Arbitration proceeding 155/1994 (Russia 1995]. A loss resulting from a higher market price can be seen as a typical loss. A (typical) loss due to non-performance is under prevailing opinion generally foreseeable [Stoll, *supra* Art. 74, para. 38; Magnus, in Staudinger [1999] Art. 74 CISG para. 40 with further citations].

71.

Furthermore, foreseeability relates to the nature or type of harm but not to its extent [Guide to art 74, Use of unidroit principles to help interpret art. 74 CISG, h.]. A precise and detailed foreseeability of losses is not required under Art. 74 CISG, and certainly not a numbered sum on the extent of loss [Magnus, in Staudinger [1999] Art. 74 CISG para. 34 with further citations]. As a consequence it does not matter that during the month of October the market price was at a historical high. As the damages occurred by the CLAIMANT are foreseeable by the RESPONDENT, there is no limitation to the CLAIMANT right to claim the price difference.

72.

**13. The CLAIMANT did mitigate his loss when he undertook a substitute transaction. Therefore, the RESPONDENT has no right to a reduction in damages**

The CLAIMANT only had to undertake reasonable measures to mitigate the loss, i.e. those which under the circumstances of the individual case could have been expected in good faith. “In the Court's view, the answer to the question of which measures would be reasonable and ought to be taken depends on how a reasonable creditor would have acted in the same situation.”[Austria 6 February 1996 Supreme Court]

73.

Although the cocoa prices were at a historic high, the CLAIMANT did not have obligation to wait for the price to go down. Firstly, it was not obvious that the price would go down in the near future, nor could the CLAIMANT have known whether the price would fall. The price of cocoa increased from September 2001 onwards and it also was possible to expect that it would be even higher in November [RESPONDENT’s exhibit No. 3]. Therefore, the cover purchase cannot be declared as unreasonable because the price of cocoa was unpredictable.

74.

The RESPONDENT had not indicated whether or when it would deliver the cocoa to the CLAIMANT and the CLAIMANT was running short of cocoa stock [CLAIMANT’s Exhibit No. 8]. If the CLAIMANT had not concluded a substitute transaction, it would have run out of stock. Consequently, it would had to stop producing confectionaries and the subsequent damages, i.e. the economic loss, would have been a lot higher than the cost of making the cover purchase. Essentially, the substitute transaction was the mitigation of loss

“[T]he Tribunal stated that the buyer's mitigation measures ought to have been avoiding the contract and concluding a substitute transaction.” [Russia 6 June 2000 Arbitration proceeding 406/1998]

The CLAIMANT therefore mitigated its loss and the RESPONDENT is not entitled to a reduction in damages.

75.

## 14. Conclusion

The CLAIMANT is entitled to USD 289,353 in damages from the RESPONDENT.