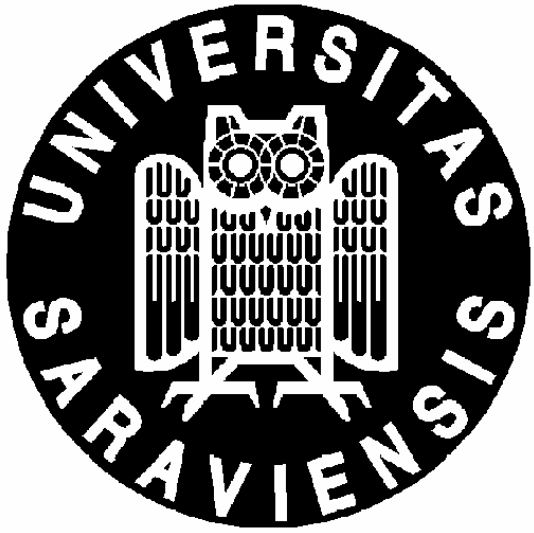
Twelfth Annual Willem C. Vis
International Commercial Arbitration Moot
2004-2005

MEMORANDUM FOR RESPONDENT



UNIVERSITY OF SAARLAND

ALEXANDER CARINGTON ♦ ANNA STIER

INGA FRANZEN ♦ JENNIFER ROGGE ♦ LARA PAIR ♦ SABINE KEMPER

CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA

Case No. Vis Moot 12

MEMORANDUM FOR RESPONDENT

IN ARBITRAL PROCEEDINGS OF:

Mediterraneo 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 seqq.	and 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
paras	Paragraphs
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. 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, Equatoriana S.A. (RESPONDENT), and invite the Tribunal to find:

- there was an impediment that prevented the RESPONDENT from performing.
- that the RESPONDENT did not commit a fundamental breach.
- the cover purchase was not valid and therefore the CLAIMANT is not entitled to any damages relating to it.
- the CLAIMANT's damages are restricted to any loss he made.
- the CLAIMANT did not suffer any loss and is therefore not entitled to damages.
- that the Tribunal has jurisdiction to decide not only the cocoa contract 1045, but also the sugar contract and award damages to RESPONDENT in the amount of 385,805 USD.
- that if the CLAIMANT is entitled to damages on the grounds of the cocoa contract 1045, these damages must be off set by the amount of the damages awarded.

_____
Signature (Counsel)

This memorandum is submitted in response to the CLAIMANT's memorandum submitted by the University of Florida.

1.

1. The cocoa contract 1045 was for cocoa from Equatoriana

Although the cocoa contract does not specifically state that the cocoa must originate from Equatoriana, it is respectively submitted that this formed part of the agreement between the two parties. Art. 11 CISG provides that the contract need not be evidenced in writing and therefore would allow this term to be incorporated into the contact, even when it is not part of the written contract.

2.

The parties have done business on a number of occasions in the past and the CLAIMANT would have known that the RESPONDENT only traded in cocoa from Equatoriana. Furthermore, the cocoa, which the parties contracted for in the past, has always come from Equatoriana [para. 14, p. 57, Procedural Order No. 2]. The CLAIMANT would have known this as he was responsible for arranging the carriage of the goods [para. 19, p. 57, Procedural Order No. 2]. Additionally, the cocoa was packed in bags indicating their origin [*supra*].

3.

It is therefore submitted that when the RESPONDENT approached the CLAIMANT and offered to sell him cocoa, the CLAIMANT knew that the cocoa in question was cocoa from Equatoriana. Furthermore, the CLAIMANT knew that the RESPONDENT only traded in cocoa from Equatoriana and that any agreement between them would be for cocoa from Equatoriana. Subsequently, the requirement that the cocoa was to come from Equatoriana formed part of the contract and both parties were bound to it.

4.

In addition to this, it is submitted that standard practice and conduct of the RESPONDENT, i.e. only delivering cocoa from Equatoriana, led to an implied term that the cocoa came from Equatoriana being incorporated into the cocoa contract 1045.

5.

2. The RESPONDENT is excused from paying damages under Art. 79 CISG.

It is contended that an impediment arose after the formation of the contract that rendered the RESPONDENT'S ability to perform impossible. Furthermore, the RESPONDENT could not have reasonably expected to have avoided or overcome this impediment, or its consequences.

Subsequently, the RESPONDENT is exempt from paying damages in accordance with Art. 79 CISG.

6.

Contrary to the CLAIMANT's submissions [Issue 1, p. 4- 6, CLAIMANT's memorandum], it is argued that only the embargo caused the RESPONDENT's inability to perform. Although the storm was the cause of the government ban on the export of cocoa, it is not contended that the storm itself constituted an impediment that prevented performance. Therefore, submissions by the CLAIMANT concerning the storm and its affect on the RESPONDENT'S ability to perform are irrelevant.

7.

a. RESPONDENT is entitled to rely on Art. 79 CISG

The CLAIMANT argues that the cocoa contract 1045 did not include terms for excusing performance due to unforeseen circumstances [Issue 1, p. 5, para. 3 CLAIMANT's memorandum] and therefore cannot be freed from his liability. However, both the CLAIMANT and RESPONDENT are party to the United Nations Convention on Contracts for the International Sale of Goods and have made no declarations or reservations. Therefore, the convention applies pursuant to its Article 1(1) [p. 4 of the Problem]. The RESPONDENT is therefore entitled to rely on Art. 79 CISG, regardless of whether or not the cocoa contract 1045 contained an express clause for excusing performance due to unforeseen impediments.

8.

b. The embargo constituted an impediment which prevented the RESPONDENT from performing his obligations.

In accordance with Art. 79 CISG, there has to be an impediment to due performance. It is submitted that the impediment should render performance impossible [Hudson; *Nuova Fucinati*]. This contention appears *prima facie* to be in concord with the CLAIMANT's submissions [Issue 1, p. 5, paras. 5 - 6 CLAIMANT's memorandum], however it is necessary to mention that the CLAIMANT's position on this matter is confused. After stating that an impediment must render performance impossible [*supra*], the CLAIMANT then appears to concede that the embargo constituted an impediment that impeded performance [Issue 1, para. 8, p. 6 of the CLAIMANT's memorandum]. The claimant then argues an impediment could be defined as something that obstructs or impedes performance, but subsequently submits that experts and the courts require

performance to be rendered impossible. Later, the CLAIMANT argues that although the embargo does appear to constitute an impediment, it did not render performance impossible. This statement is confusing and appears contradictory, as the CLAIMANT had earlier defined an impediment to be something that rendered performance impossible [Issue 1, p. 5, paras. 5 - 6 CLAIMANT's memorandum].

9.

Despite this ambiguity, the position of the RESPONDENT is that performance must be rendered impossible. The CLAIMANT argues that performance was possible, as the RESPONDENT could have obtained coca from other sources. However, as discussed above, the cocoa contract 1045 was for cocoa from Equatoriana. The RESPONDENT never agreed to deliver cocoa from any other source. If the RESPONDENT had delivered cocoa from any other source, this could have constituted a breach of contract due to the non-conformity of the goods. Primarily, however, the RESPONDENT never agreed to supply cocoa from another source and therefore was never obligated to. Therefore, as the embargo made it impossible for the RESPONDENT to deliver cocoa from Equatoriana to the CLAIMANT, the embargo made it impossible for the RESPONDENT to perform in accordance with the cocoa contract 1045. For these reasons it is contended that the government ban on exporting cocoa constituted an impediment within the meaning of Art. 79 CISG.

10.

In the alternative, if this Tribunal is of the opinion that the cocoa contract was not specifically for cocoa from Equatoriana, it is submitted that performance was still rendered so difficult as to be considered impossible. The RESPONDENT has never traded in cocoa from other countries and therefore would not have any connections with cocoa suppliers outside of Equatoriana. Therefore, it would be difficult for the RESPONDENT to find a cocoa supplier. That the RESPONDENT has traded with other commodities in other countries is irrelevant. This task would have been made onerous by the fact that the RESPONDENT would not know whether the supplier was reliable, or whether the goods would be in accordance with the contract. As the RESPONDENT would be liable for any breach by his supplier, this would have made performance excessively onerous on the RESPONDENT.

11.

Furthermore, there are few other countries that produce cocoa at the same grade as Equatoriana [RESPONDENT's Exhibit No. 1], making performance even harder. In fact, performance would have made so onerous, that it should be considered impossible.

12.

In addition to this, the government ban was only temporary. The RESPONDENT was confident he would be able to perform using cocoa from Equatoriana as soon as the ban was lifted. However, the CLAIMANT prevented the RESPONDENT from performing when the ban was lifted through his illicit avoidance of the contract and purchase of cocoa elsewhere. It would not be fair, just or reasonable to make the RESPONDENT liable for his inability to perform, when this inability has been caused by the CLAIMANT. Therefore, it is respectively submitted that the embargo did constitute an impediment to performance within the meaning of Art. 79 CISG.

13.

c. The RESPONDENT cannot reasonably be expected to have taken the impediment into account at the conclusion of the cocoa contract 1045

The RESPONDENT must reasonably be expected not to have taken the impediment into account at the conclusion of the cocoa contract 1045. The embargo, the impediment, was put in place due to the damage caused by the storm. There have been no storms in Equatoriana for 22 years prior to the storm in the 2002. Furthermore, the storm that occurred in 1980 did not cause extensive damage. As storms, especially storms as severe as the one in 2002, are such a rarity in Equatoriana, it is not reasonable to expect the RESPONDENT to have taken into account a storm creating such extensive damage to the cocoa crops as to warrant an export ban at the time the contract was concluded.

14.

In the final analysis, the determination of whether the RESPONDENT can reasonably be expected to have taken the impediment into account can only be made by a court or tribunal on a case-by-case basis [Secretariat Commentary on Art. 79 CISG]. It is therefore submitted that previous case law has no bearing on the Tribunal's determination in this matter. Subsequently, the authorities submitted by the CLAIMANT concerning this point are irrelevant [paras. 16 - 17, pp. 8 - 9 CLAIMANT's memorandum].

15.

The claimant argued that the RESPONDENT should have enquired as to the weather conditions and subsequently should have known about the storm. However, given the time between the conclusion of the contract and the storm (approximately four months), it is extremely unlikely anyone would have known that a storm was pending, or whether it would even hit Equatoriana. Furthermore, the RESPONDENT would not be able to establish its severity, or its effect on the cocoa crops. The RESPONDENT, therefore, could not have and can not reasonably be expected to have taken the storm and its subsequent effects into account at the conclusion of the contract.

16.

d. The impediment was beyond the RESPONDENT's control

In accordance with Schlechtriem, the RESPONDENT is not responsible for the impediment when he could not have prevented it through preparation, control and planning [Southerington]. The Organisation is the only institution that supplies cocoa in Equatoriana [para. 11, p. 56 Procedural Order No. 2]. The Organisation's monopoly over cocoa from Equatoriana meant that the RESPONDENT could not have purchased the cocoa from Equatoriana elsewhere, nor could the RESPONDENT have a contingency plan as suggested by the CLAIMANT [Issue 1, para. 18, p. 9 CLAIMANT's memorandum].

17.

The decision of the Organisation to ban the export of cocoa was beyond the RESPONDENT's control. The RESPONDENT had no control over the release of cocoa by the Organisation and all exporters that requested an exemption from the ban were rejected [para. 11, p. 56 Procedural Order No. 2]. Furthermore, there was no legal procedure in place that would have enabled the RESPONDENT to protest against the embargo [*supra*].

18.

Therefore, the impediment was beyond the RESPONDENT's control.

19.

e. The RESPONDENT could not have overcome the impediment or its consequences

It is submitted that the RESPONDENT could not have overcome the embargo or its consequences. As mentioned above, the RESPONDENT could not have used any other suppliers, because the Organisation had a monopoly over cocoa from Equatoriana. As the CLAIMANT

notes himself, "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" [Issue 1, para. 18, p. 9 CLAIMANT's memorandum; Federal Supreme Court decision in Bundesgerichtshof 24 March 1999]. Therefore, the RESPONDENT could not have overcome the impediment by buying cocoa elsewhere, as this cocoa would not have conformed to the cocoa contract 1045.

20.

It is necessary to mention here that this requirement 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 on Art. 79 CISG]. It is submitted that the RESPONDENT was not merely awaiting events that would justify his non-performance.

21.

Firstly, the storm and subsequent governmental ban were unforeseeable and took place before the RESPONDENT was obligated to perform. Therefore, it is clear that the RESPONDENT did not merely wait for the impediment to occur, so that he could avoid performance.

22.

Secondly, as soon as the RESPONDENT was able to export any cocoa to the CLAIMANT, it did so. This also demonstrates that the RESPONDENT was willing to perform his side of the cocoa contract 1045 when he was able to.

23.

Thirdly, the RESPONDENT knew the impediment would be temporary, as it would cease once the embargo was lifted. Therefore, he was confident that the impediment could be overcome once the ban was at an end. However, the CLAIMANT's unlawful avoidance and purchase of cocoa elsewhere prevented the RESPONDENT from overcoming the impediment. It would not be just, fair or reasonable to hold the RESPONDENT liable for his inability to overcome the impediment, when it was the CLAIMANT's actions that prevented him from doing so.

24.

In addition to this, it is also contended here that the authorities submitted by the CLAIMANT concerning the failure of specific source are irrelevant and should not be considered by this Tribunal [Issue 1, paras. 25 – 26, pp. 10 -11 CLAIMANT's memorandum]. These authorities concern the doctrine of frustration, a concept of the English legal system. This concept does not

reflect the position of the law in regard to CISG. Furthermore, Southerington expresses the opinion that the doctrine of frustration differs quite significantly from other concepts of impossibility [Southerington]. These authorities should therefore be disregarded as irrelevant and unhelpful in this case.

25.

Furthermore, even if the "Finland birch timber case" was to be considered, the coca contract 1045 would still be frustrated. Firstly, the Finland case applies in cases where only one party intended a particular source. As argued above, both parties intended the cocoa to come from Equatoriana, therefore the Finland case does not apply.

26.

Secondly, the contract will be considered frustrated when a specific source fails only when the buyer was not aware that there was only one source. In the present case, the CLAIMANT had done business with the RESPONDENT on more than one occasion in the past [p. 2 of the Problem]. It is thus contended that the CLAIMANT would know that the Organisation was the RESPONDENT's only source of cocoa. Therefore, the contract should not be considered frustrated and the Finland case should not be applied.

27.

In conclusion, it is respectively submitted that all the requirements of Art. 79 CISG have been fulfilled. This Tribunal is therefore invited to find that the RESPONDENT was not liable to perform his obligations.

28.

3. The delay in delivering the cocoa did not constitute a fundamental breach of contract and the CLAIMANT was not entitled to avoid the contract

It is submitted that the CLAIMANT did not declare the contract avoided in accordance with Art. 49 (1) (a) CISG, as not all requirements of a fundamental breach within the meaning of Art. 25 CISG were fulfilled.

29.

a. RESPONDENT did not commit a fundamental breach of the contract

A fundamental breach within the meaning of Art. 25 CISG is defined as a breach of contract that results in such a detriment to the other party as to substantially 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. Furthermore, it is submitted that all requirements must be met for a breach to be considered fundamental.

30.

i. There was no breach of contract

It is argued by the CLAIMANT that the delay in delivery constituted a breach of contract. However, it is submitted that the CLAIMANT consented to the delay and therefore it did not constitute a contractual breach. The CLAIMANT inquired about a new shipping date in August [CLAIMANT's Exhibit No. 7], three months after the deadline stipulated in the cocoa contract 1045 [CLAIMANT's Exhibit No. 2]. It is submitted that this letter indicates that the CLAIMANT consented to the delay under the circumstances and therefore the delivery dates stipulated in the cocoa contract 1045 no longer apply.

31.

Art. 29 CISG provides that a contract can be modified by mere agreement of the parties. As the RESPONDENT informed the CLAIMANT of the delay in delivery, it is submitted that CLAIMANT's acceptance of this delay, evidenced through his requests for a new shipping date, amounted to a modification of the original delivery dates outlined in the written contract. This resulted in the original delivery dates being discarded. However, as the CLAIMANT failed to set another delivery date, the agreement between the parties no longer stipulated a fixed delivery date. Therefore, no breach of contract caused by the delay in delivery was committed by the RESPONDENT.

32.

ii. detriment

If this Tribunal are of the opinion that there was a breach of contract, it is submitted that this breach was not fundamental. The CLAIMANT has not provided evidence that the RESPONDENT's delay in delivery caused any detriment to the CLAIMANT. The CLAIMANT still had 100 tons of cocoa in stock when he unlawfully made the cover purchase [para. 24, p. 58 Procedural Order No. 2]. Therefore, he had not been forced to stop production of any of his products and subsequently had not suffered any loss.

33.

Furthermore, any loss suffered by the CLAIMANT must be substantial [Joseph Lookofsky]. The CLAIMANT has provided no evidence of any loss and therefore cannot argue that his loss was

substantial. Therefore, the alleged breach caused the CLAIMANT to suffer no detriment and therefore cannot be considered fundamental within the meaning of Art. 25 CISG.

34.

iii. expectation component

The CLAIMANT must have been deprived of what he was entitled to expect under the contract for the breach to be fundamental. "A delay in delivery can rise to the level of a fundamental breach when a timely delivery is in the special interest of the buyer" [OLG Hamburg, 1. Zivilsenat 28.02.1997]. In accordance with the cocoa contract 1045, the RESPONDENT was originally to perform his obligations within the period from March to May 2002. This lengthy deadline suggests that timely delivery was not of great importance to the CLAIMANT. Furthermore, the CLAIMANT informed the RESPONDENT that he was "not under immediate pressure to receive the contracted cocoa" and that they would only need the cocoa "later in the year" [CLAIMANT's Exhibit No. 4]. Therefore, it is submitted that the delay did not deprive the CLAIMANT of what he was entitled to expect under the contract, as timely delivery was not in the special interest of the RESPONDENT.

35.

Additionally, the CLAIMANT is producer of confectionary items, some of which require cocoa to be made [p. 2 of the Problem; para. 24, p. 58 Procedural Order No. 2]. The cocoa was ordered to allow the CLAIMANT to continue producing these products. At the time of the illicit avoidance and cover purchase, the CLAIMANT still had 100 tons of cocoa in stock and therefore was still able to produce the confectionary items [*supra*]. Therefore, the CLAIMANT was not deprived of what he was entitled to expect under the contract, as he was still had surplus cocoa to produce confectionary items.

36.

iv. foreseeability

Art. 25 CISG requires that the consequences of the breach were foreseeable to the seller or a reasonable person of the same kind in the same circumstances. The wording of the convention does not specify at what moment foreseeability is relevant: at the conclusion of the contract or the time of the performance.

37.

At the time of the conclusion of the contract, the RESPONDENT had no reason to know or be able to foresee that (a) timely delivery was of great importance to the buyer and (b) a delay would cause the CLAIMANT any detriment. The RESPONDENT was not informed at this time about the status of the CLAIMANT'S stocks.

38.

The RESPONDENT also would not have foreseen the consequences of the breach at the time of performance. The CLAIMANT had informed the RESPONDENT that he was not under pressure to receive the cocoa until later in the year [CLAIMANT's Exhibit No 4], thus the RESPONDENT could not have foreseen that the delay would cause the CLAIMANT to suffer any loss or detriment. Furthermore, the CLAIMANT did not inform the RESPONDENT that he was going incur losses for the delay; neither did the CLAIMANT give a fixed date for when he would need the cocoa. Therefore, the RESPONDENT could not have foreseen the CLAIMANT suffering a loss as a result of the delay.

39.

Furthermore, the reasonable person of the same kind under the same conditions would not have foreseen the consequences of the breach. The hypothetical reasonable person ought to work in the same function and in the same line of trade [Bianca-Bonell Art. 25. para. 2.2.2.2.1]. The requirement of the same circumstances refers to the conditions on world and regional markets, to legislation, politics, and climate and also on prior contacts and dealings [Bianca-Bonell Art. 25 para 2.2.2.2.1]. The CLAIMANT's average cocoa requirement is 1,500 tons [para. 24, p. 58 Procedural order 2]. The reasonable person could not have known the status of the CLAIMANT's stocks by the information which was given in the CLAIMANT'S letter of March 5, 2002 [CLAIMANT's Exhibit No, 4] and August 15, 2002 [CLAIMANT's Exhibit No. 7]. The information provided by the CLAIMANT in those letters also would not have enabled the reasonable person to have foreseen the consequences of the delay, i.e. the loss from having to stop production due to the shortage of cocoa.

40.

v. Result

The RESPONDENT did not commit a fundamental breach of contract and therefore the CLAIMANT was not legally entitled to avoid the contract according to Art. 49 (1) a CISG.

41.

4. The CLAIMANT cannot avoid the contract in accordance with Art. 49 (1) (b) CISG

a. There was no non-delivery, merely a delay in delivery

The delay in delivery did not constitute a non-delivery. The RESPONDENT never informed the CLAIMANT that he was not prepared to deliver and the embargo was only temporary. The RESPONDENT was therefore going to deliver the cocoa as soon as the ban was lifted. However, the CLAIMANT's illicit cover purchase and avoidance prevented the RESPONDENT from performing his obligations.

42.

b. The CLAIMANT did not fix an additional period of time

In accordance with Artt. 49 (1) (b) and 47 (1) CISG, the CLAIMANT did not fix an additional period of time for the RESPONDENT to deliver. Therefore, the CLAIMANT was not entitled to avoid the contract.

43.

5. The CLAIMANT has no right to damages

The RESPONDENT is excused from paying damages in accordance with Art. 79 CISG, as performance was rendered impossible by the embargo. Subsequently, the CLAIMANT has no right to claim damages against the RESPONDENT.

44.

a. If an impediment existed, the CLAIMANT still had no right to avoid the cocoa contract 1045 and therefore has no right to claim damages under Art. 74 – 76 CISG

If the Tribunal are of the opinion that no impediment existed that prevented performance by the RESPONDENT, it is submitted that CLAIMANT still had no right to avoidance.

45.

The CLAIMANT could only rightfully avoid the contract when the requirements of Art. 49 CISG have been fulfilled. It is contended that these requirements were not satisfied and therefore no right to avoidance arose. Art. 49 CISG only allows the CLAIMANT to avoid the contract when either (a) there was a fundamental breach by the RESPONDENT, or (b) the RESPONDENT did not deliver within an additional period of time fixed by the CLAIMANT.

46.

As discussed above, the RESPONDENT did not commit a fundamental breach of contract. Furthermore, there was no additional period of time fixed by the CLAIMANT. Subsequently, the CLAIMANT had no right to avoidance.

47.

i. The CLAIMANT has no right to claim damages under Art. 75 and 76 CISG

As a result, the CLAIMANT cannot claim damages under Art. 75 and 76 CISG.

48.

ii. The CLAIMANT has no right to claim damages under Art. 74 CISG

As the CLAIMANT has no right to claim damages under Art. 75 and 76 CISG, the CLAIMANT can only claim damages under Art. 74 CISG, when it is established that there was a breach of contract by the RESPONDENT. It is submitted that the only breach that could have been committed by the RESPONDENT is the delay in delivery.

49.

However, Art. 74 only entitles the CLAIMANT to claim damages equal to the loss he has suffered. The CLAIMANT has provided no evidence that the delay in delivery caused any loss. In fact, at the time when the CLAIMANT made the unlawful avoidance, the CLAIMANT still had 100 tons of cocoa in stock [para. 24, p. 58 Procedural Order No. 2]. Thus, no loss was suffered by the claimant.

50.

6. If there was the right to avoidance, there was no avoidance before 15 November 2002

If the Tribunal finds that the CLAIMANT did have a right to avoid, it is submitted that avoidance did not take place before 15 November 2002.

51.

a. The CLAIMANT's letter on 15 August 2002 did not constitute a declaration of avoidance

It is argued that the letter of August 15 was not precise enough to amount to avoidance [CLAIMANT's Exhibit No. 11]. The requirements for the clarity of the declaration have been set at a high level [OGH 10 Ob 518/95 (Austria 1996)]. For even if a conclusive declaration to avoid

a contract is regarded as sufficient, the intention of the buyer not to adhere to the contract anymore has to be obvious beyond any doubt [cf. LG Frankfurt aM, RIW 1991, 952/953]. In the letter of 15 August the CLAIMANT wrote that he would need cocoa soon. This does not show that the need was as urgent as the CLAIMANT now purports. Furthermore, the letter certainly does not make CLAIMANT's purported intention to no longer adhere to the contract clear or obvious. He did not fix a deadline up to when he would accept cocoa from the RESPONDENT, nor did he set a date when he would buy substitute goods. It is therefore not clear that the CLAIMANT wanted to end the contract with this letter. If he wanted to avoid the contract at this time, he would not have asked for the delivery of the cocoa.

52.

Additionally, the CLAIMANT himself is not sure of which date he would have liked to avoid the contract. Firstly, the CLAIMANT argues that avoidance took place shortly after 15 August 2002. [para. 50, pg. 18 CLAIMANT's memorandum], but then alleges that avoidance took place on August 15 [[para. 57, pg. 21 CLAIMANT's memorandum].

53.

The uncertainty of the CLAIMANT as to when avoidance took place does not fulfil the requirement that the CLAIMANT's intention to no longer adhere to the contract should be obvious beyond doubt. Therefore, it is submitted that avoidance was not declared by the letter on 15 August 2002.

54.

b. There was no declaration of avoidance on 24 October 2002

Furthermore, it is submitted that there was no valid avoidance on 24 October 2002. For avoidance to be effective, it is required that the other party is notified of the avoidance in accordance with Art. 26 CISG.

55.

A cover purchase cannot replace a notice of declaration of avoidance of a contract [OLG Bamberg, 3 U 83/98 (Germany 1999)].

56.

As cited above, requirements for the clarity of avoidance have to be set at a high level. The cover purchase does not indicate the CLAIMANT's intention to avoid the contract. Furthermore, the RESPONDENT could not have known that the CLAIMANT wanted to avoid the contract

because he was not informed of the CLAIMANT's intentions or acts. Therefore, a cover purchase cannot represent a valid declaration of avoidance.

57.

Additionally, the CLAIMANT states that, "this purchase did not alleviate RESPONDENT's responsibility to meet its contract." [para. 48, p. 15 CLAIMANT's memorandum]. This statement does not suggest that the CLAIMANT intended to avoid the contract, as the CLAIMANT expects to the RESPONDENT to meet his contractual obligations. It certainly does not suggest the CLAIMANT's unequivocal intent to no longer adhere to the contract. For these reasons, it is submitted that the cover purchase did not amount to a declaration of avoidance.

58.

c. The declaration of avoidance took place on 15 November 2002

The claimant avoided the contract explicitly in its letter of November 15 [Claimant's Exhibit No. 11]. This was the only time when he validly declared the contract avoided.

59.

However, avoidance at this time does not entitle the claimant to damages for the cover purchase. Under Art. 75 CISG the claimant has only the right to cover damages if there has been avoidance and a cover purchase in a reasonable manner and within a reasonable time after avoidance [Secretary Commentary on Article 75 CISG]. As the cover purchase had already taken place on 24 October 2002, Art. 75 CISG is not applicable. Instead, Art. 76 CISG applies, where, "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".

60.

Art. 76 provides a right to damages, however the price to be used when calculating the sum of the damages is the current price prevailing at the time the contract was avoided [Secretariat Commentary on Art. 76 CISG; Barry]. As the avoidance took place in November, the market price of November has to be regarded.

61.

The market price in November per metric ton was 1,814.16 USD, for 300 tons: 544,248 USD. The difference between this price and contract price for the 300 tons is 172,023 USD. Therefore, the CLAIMANT is only entitled to 172,023 USD in damages.

62.

7. If the Tribunal finds that avoidance took place before 15 November 2002, then it took place on 15 August 2002 and the cover purchase was not in a reasonable time frame. Furthermore, the claimant did not mitigate his loss

If the Tribunal finds that avoidance did take place before 15 November 2002, then it is submitted in the alternative, in accord with the CLAIMANT, that avoidance took place on 15 August 2002. However, as the cover purchase took place two months after the avoidance, it is submitted that it was not within a reasonable timeframe and therefore not a valid cover purchase.

63.

a. The cover purchase was not within a reasonable time

A cover purchase made two months after the original avoidance is not within a reasonable time frame. The claimant avoided the contract, alleging that he would need cocoa soon. However, if he needed the cocoa so urgently as to warrant avoiding the contract, it does not make sense that the CLAIMANT waited two more months before making the alleged cover purchase.

64.

The reasonableness of the time has to be considered on a case by case basis and the person concerned must take into consideration and act as the reasonable person will [Use of the UNIDROIT Principles to help interpret CISG Article 75]. Therefore, the behaviour of a reasonable person acting in a similar situation has to be considered. It would have been reasonable if the CLAIMANT had made the purchase directly after avoidance, as he knew that the market price was augmenting. It might be necessary to have some time to compare different possibilities, but it is submitted that this would not take two months. A reasonable person, in need of the goods, would have bought the substitute goods at the end of August or, at the latest, early September. A reasonable person would not have waited until the middle of October to make the purchase. Consequently, it is submitted that the CLAIMANT's cover purchase did not take place in a reasonable time frame.

65.

As the cover purchase was not made within a reasonable time frame, Art. 76 applies instead of article 75 [Secretariat Commentary on Art. 75]. This is also the case when it is impossible to determine if it was within a reasonable time [Secretariat Commentary on Art. 76 CISG]. Accordingly, the CLAIMANT is only entitled to claim damages under Art. 76 CISG. Under Art. 76, the damages have to be calculated as the difference between the current price and the contract price. [Secretariat Commentary on Art. 76 CISG].

66.

b. Failure to mitigate

Even if the court assumes that the avoidance was within a reasonable time frame, the CLAIMANT failed to mitigate because he waited two month before purchasing. The courts have decided avoiding the contract and undertaking a cover purchase are the mitigation measures necessary in this case [Arbitration proceeding 406/1998 (Russia 2000)]. If the claimant believed that he was running out of stock, he should have bought substitute goods directly. Therefore, a direct cover purchase would have amounted to mitigation. However, as the claimant did not undertake an immediate cover purchase and waited, until a time when the cost of cocoa was much higher, he did not mitigate his loss.

67.

c. Damages

Under Art. 77 CISG the RESPONDENT has the right to claim a reduction in the damages in the amount by which the loss should have been mitigated. In the case of mitigation, the CLAIMANT would have bought substitute goods in August so that the damages have to be calculated in reference to Art. 76. Therefore, the RESPONDENT only has to pay the difference between the contract price and the current price of August.

68.

The market price in August per metric ton was 1,960.05 USD (588, 165 USD for 300 tons). The difference between this price and contract price for the 300 tons is 215,940 USD.

69.

Therefore, in this case the RESPONDENT is only liable to pay the CLAIMANT 215,940 USD in damages.

70.

8. The applicable arbitral rules in this case are the Swiss Rules in the version of January 1st, 04.

a. The Swiss Rules are the applicable procedural rules.

Following the dispositions made in the arbitration clause of the cocoa-contract of November 19th, 01, the Swiss Rules must be the set of arbitral rules to apply in this case.

This is apparent considering CLAIMANT's underlying claim arising out of the cocoa-contract, it's request for arbitration, and the events leading up to the formation of this panel. The arbitration clause of the cocoa-contract and the parties' choice of an arbitral set of rules expressed within forms the basis of this arbitration.

71.

For reasons of legal certainty the fact that the sugar contract contains a different arbitration clause cannot affect the legal framework in which the main claim is set. Otherwise the proceedings would depend on a defence claim which is entirely on RESPONDENT's side to evoke. Nonetheless there is a general understanding that any one-sided clause (*potestative* clauses) options should be avoided in legal proceedings.

72.

The parties on November 19th, 01, have done so for the cocoa-contract. According to the arbitration clause the parties chose the Rules of the Geneva Chamber. These Rules however do not exist anymore but have been followed by the Swiss Rules for all (6) Swiss Chambers of Commerce and Industry.

73.

The parties' expressed wish applying the Geneva Rules cannot be realised. Due to practical necessity the arbitration clause of the cocoa-contract must be revised in this point - as it should - according to general principles of interpretation with the goal of meeting the intentions of the parties. Here the parties wanted the Geneva Chamber to administer an eventual arbitration on the cocoa-contract on the grounds of its set of rules. As the actual Swiss Rules are the direct descendants of the old Geneva Rules, the parties' intention is respected by applying the actual Swiss Rules to the case. This is more so bearing in mind that the actual Swiss Rules have been

drawn up on the grounds of all the old arbitral rules of the different Swiss Chambers, containing therefore a considerable part of the old Geneva rules as well.

74.

b. The Swiss Rules are applicable in the version of January 1st, 04.

Fully respecting the intention and choice of the parties as to the set of rules the arbitration should follow it is the latest version of the Swiss Rules of January 1st, 04, that has to be considered. Forming the cocoa-contract on November 19th, 01, the parties referred to the Swiss Rules in force on that day. However, any major changes concerning this set of arbitral rules they could not foresee in detail.

75.

The solution is to be found in the Swiss Rules themselves: "Changes and additions reflect[ing] modern practice and comparative law in the field of international arbitration." (Introduction (b) (ii)). As it is only sensible in a permanent changing international trading world in which this arbitration is set, the parties must wish that the most adapted and modern rules should govern the proceedings. "A modernisation of certain provisions…was, however, inevitable…"(*Scherer*, New Rules on International Arbitration in Switzerland, p.1).

76.

Art. 1(3) of the Swiss Rules defines the scope of application: "These Rules shall come into force on January 1st, 2004, and unless the parties have agreed otherwise, shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date." There's nothing to be added here. The request for arbitration has been made on July 7th, 04, and therefore falls undoubtedly within the scope of Art. 1 (3) Swiss Rules. Referring to case law of the (Swiss) Federal Tribunal *Scherer* points out that: "…an opting out of the Swiss Rules in favour of the old Rules requires a specific agreement."(*Scherer,* p.2, FN 11). The parties have not agreed "otherwise" e.g. on a specific old version of the Swiss Rules or even the Geneva Rules and as we have seen above, they did not have any sensible reason to do so in order to secure the success of the arbitration.

77.

9. The Swiss Rules apply to this arbitration in their entirety, including Art. 21(5).

a. Party intention to include all articles of the Swiss rules was expressed.

CLAIMANT objects to the applicability of Art. 21(5) Swiss Rules propounding that the parties never agreed to the provisions (Answer to the Counter-Claim, 31-08-04, Problem p.40). An agreement of this kind was not necessary. Party autonomy must be respected and even more so on the "larger" scale of international (arbitral) law that is mainly created by repeated exercise of party autonomy (*Naón*, Choice of Law Problems in International Commercial Arbitration, p.30) and in this case it has been respected.

78.

The arbitration clause in the cocoa-contract refers to a set of arbitral rules of an arbitral institution in order to help the parties set up and organize the arbitral proceeding. The advantage of this kind of professional assistance for any arbitration lies at hand. Giving the institution a task to do must include giving the powers to fulfil it, as well. Without it, the Institution's work would depend entirely on the ad hoc decisions of the two parties. In a controversial situation it is unlikely that they would agree on anything. Limiting the Institution's powers to work to this extend, would make its existence futile all together. The parties may lay down all rules as to govern their arbitration directly in the arbitration clause and decide any later changes by mutual agreement (Art. 182 (1) (Swiss) IPRG, 1987, underlining the parties' option to either refer to a set of rules *or* reorganize the proceedings by themselves). Although these parties here are at a point where arbitration is necessary opposed towards each other in a very controversial way and not likely to come to sensible agreements as to the organization of their arbitral proceeding.

79.

"Haben die Parteien das Verfahren nicht selber geregelt, so wird dieses, soweit nötig, vom Schiedsgericht festgelegt…" (Art. 182 (2) IPRG). Where the parties did not agree on a provision, e.g. because its necessity came obvious only after the contract and its arbitral clause has been formed, the institution itself must be entitled to complete and change the applicable procedural rules. The Institution is, with regards to the parties and the proceeding, undoubtedly objective and will use its own power to organize the proceeding in the same objective way. The Institution's freedom of setting up the arbitration derives directly from party autonomy, the parties meanwhile "…submit themselves without reserve to the procedure…"(*Bachmann,* Switzerland: the Court of

Arbitration of the Zurich Chamber of Commerce in: Handbook of Institutional Arbitration in International Trade, p. 209) and hand over to the institution part of their own autonomy to set up an arbitration. *Redgern/ Hunter* consequently state: "Once [a claim] is referred, the legal position is *not* governed by contractual procedures (which have spent their force in this respect) but by the relevant rules of arbitration."(Law and Practice of International Commercial Arbitration, p.243).

80.

The institutions power includes the freedom of changing the rules as to adapt them as optimal as possible to any new necessities and developments in international (arbitral) law. As an example the Chamber changed Art. 1(2) Swiss Rules on the day after the request for this arbitration was submitted in order to allow any seat of arbitration the parties have agreed upon whether this seat is to be inside or outside Switzerland (Letter from the Geneva Chamber to both parties, 16-07-04, Problem p.22). Before this change, the choice of the parties was not permissible under the rules. The Institution took into account the parties' wish to hold their arbitration in Vindobona, Danubia as a sensible proposal but their agreement on this change has not been opposed. The provision has been changed by the institution's own power to do so, thus evidencing that the Institution has inherent authority over all aspects of the rules once they are chosen.

81.

The new provision of Art. 21(5) Swiss rules was introduced in an equally valid way, because party autonomy is limited within the framework of the rules and the parties agreement on changes of the rules is not necessary to make any of these changes valid. Contrary to what CLAIMANT is arguing, the parties, once the request for arbitration has been submitted in July 5th, 04, did not have to agree to the new provision and allow its applicability on this case explicitly because they anticipated their agreement on the changes by transferring the organization of the arbitration into the hands of the - objective - Chamber. Still any kind of anticipated agreement must meet the general prerequisites for legal clauses which have to be specific. A clause which has to be specified at a later time by an objective third person always meets this general legal standard of specificity (See the leading case of the German Federal Supreme Court of 05-12-85, WM 1986, pp.688 (689)). The applicability of the Swiss Rules in their entirety and the provision of Art.21(5) especially is neither contrary to party intention as we have seen above nor is it contrary to the laid down arbitration clause of the cocoa-contract.

82.

b. The panel has jurisdiction over RESPONDENT's defensive claim, because the arbitration clause must be interpreted in accordance with the Swiss rules.

The arbitration clause of the cocoa-contract confers jurisdiction on the panel for "Any disputes arising with respect to or in connection with this agreement...". Defence claims of the RESPONDENT may principally fall under this scope of jurisdiction. In this case RESPONDENT raises a defence claim on the grounds of the sugar-contract of November the 21st, 03. The language of the arbitration clause in accordance with the model arbitration clause of the Swiss Rules or even the one in the UNCITRAL Model Law, specifies "any" dispute, controversy or claim. Second, Art. 21(5) of the Swiss rules permits even completely unrelated claims, with their own arbitration clauses, to be decided by the same panel

83.

i. Respondent's defensive claim is covered by scope of jurisdiction specified in the arbitration clause

The panel has jurisdiction to decide RESPONDENT's defensive claim because the claims are sufficiently related under the rules. Art. 19 Swiss Rules do not only allow but encourage defensive claims to be decided in the same arbitration proceeding as the underlying claim. Contrary to what CLAIMANT proposed, and matching the arbitral clauses' prerequisites for a defensive claim, RESPONDENT's claim is a dispute arising in connection to the cocoa-contract. Not only are the contractual parties the same two trading partners that have formed the cocoa two years previous, but it is also to be mentioned that the commodities that were the main object of the contracts, one cocoa, one sugar, do depend on the same family of goods. Goods that are needed for the production in the confectionary industry. The sugar contract forms a part of the two parties' business dealings that remain in the industry of confectionaries. The business dealings of the parties in the same industry form a coherent business relationship in which each contract is only a part of the whole. Looking at the cocoa and sugar contracts as parts of this larger concept reveals that there is a relationship between the parties and their contracts are related. One contract being related to another brings the sugar contract within the scope of the arbitration clause of the cocoa contract. These two factors form a basis of connection sufficient to justify jurisdiction of the panel.

84.

The two factors are sufficient because the arbitration clause interpreted in accordance with Swiss rules allows for a liberal scope of jurisdiction. Choosing the concrete terms of this clause the parties chose the very broadest type of clauses that would still be compatible with the necessity of all clauses to be specific if they do want to avoid the risk of invalidity. The model arbitration clause allows any claims in connection to the contract. While one could view the terms 'in connection to' as limitation, it is better seen as the widest possible wording without loss of specificity, as required by international commercial law for arbitration clauses. These broad terms must then be interpreted in accordance with the rules they refer to. These rules extend jurisdiction beyond the plain meaning of the text to claims that are even unrelated. Art. 21 (5) names "set-offs" as permissible when unrelated, thus broadening the scope of the clause and diluting the requirements of relatedness. In diluting the element of relatedness, the rules encourage that all claims are to be brought and decided at the same time. RESPONDENT's claim is thus connected to the contract within the meaning of the Swiss rules, falling within the scope of the arbitration agreement.

85.

Any claim arising out of or related to the cocoa contract, is sufficient. A claim arising out of a related contract is thus also sufficient, when asserted in connection with the originating contract. Unrelated claims only refers to claims that do not arise out of the same business relationship, and are too remote to have any connection with each other. Following these considerations RESPONDENT's claim is not unrelated to the main claim and there is no sensible reason the panel should be denied jurisdiction.

86.

ii. RESPONDENT's defensive claim falls into the scope of arbitration given to the panel by Art.21(5)

Arguendo, the panel finds no relatedness between the controversies, an unrelated claim still is covered by the scope of arbitration as laid down in the arbitration clause of the cocoa-contract. In this clause we can find no reference to a provision as Art. 21(5) proposes. Such a reference was not possible as the parties could not foresee this change of the Swiss rules. But an arbitral agreement of this kind has to be interpreted accordingly to the Swiss Rules as the applicable set of rules they're referring to. The Swiss rules in their Introduction ((b) (ii)) show

their principal openness towards any changes in arbitral law practice that indicates necessary changes in the rules in order to maintain these rules as most adapted to modern standards. The arbitration clause should be as flexible as the rules themselves towards any necessary changes. Even more so as arbitral clauses with their often long life before being applied risk otherwise to be overcome for their age and are no use for resolving any disputes (better than any stately proceedings). As we can see in this case, an understanding of the clause which is limited to the plain meaning of it's terms would have such unpractical consequences as the need to arise dead rules to life, e.g. "the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland" the parties agreed to in their arbitration clause of November 19th, 01 while forming the cocoa-contract (Contract: Cocoa 1045, Problem p.8). A wide interpretation of the arbitration clause is therefore necessarily indicated if one does not want to put the whole proceeding in danger of uselessness. The terms of the chosen arbitration clause are thus not contrary to the application of the Swiss rules in their entirety, including Art. 21(5).

87.

c. RESPONDENT's defensive claim must be decided whether as set-off or as counterclaim.

Even if the panel interprets the requirements of relatedness under the rules strictly, according to Art. 21(5) of the Swiss rules, RESPONDENT's defensive claim falls within the jurisdiction of this panel. While 21(5) literally allows jurisdiction for set-offs, this mention is not exclusive but descriptive of defensive claims of the same nature as a set off. The mention is not exclusive because the Swiss rules, as cited by the CLAIMANT, even treat set-offs and counterclaims in the same fashion at a different place in the rules (see Art. 19(3)). Set-off and counterclaim are of the same nature: they can be risen in a proceeding departing from the same material claim. Even CLAIMANT propounds in its brief at paragraph 93, that "the economic difference between counterclaim and set off is minimal in general". In this case, the economic difference is around 96,000 € only. Often there is no difference made when treating a defensive claim, whether it is called counterclaim or set-off. Learned scholars discuss the general question whether unrelated set-offs and counterclaims are permissible in arbitral law principally at the same time without expressing the need of any distinction between these two defensive tools. (*Scherer*, pp.4,5; *Berger*, Die Aufrechnung im internationalen Schiedsverfahren, RIW 98, pp.426; *Schütze/ Tscherning/ Wais,* Handbuch des Schiedsverfahrens. Praxis der deutschen und internationalen

Schiedsgerichtsbarkeit, pp.28 (31)) Thus RESPONDENT's defensive claim falls within the scope of Art. 21(5).

88.

The reason for 21(5) was to expedite proceedings when a defensive claim arises. CLAIMANT propounds that considering the claim as set-off only would expedite the proceedings, however, both tools require the assessment of the same elements and the same issues in short the merits of the case need to be addressed whether counterclaim or set-off. If we decided the set-off only, the remaining amount must be decided in a different, new, costly and time-consuming proceeding, thus wasting time and resources. It would be against the aim of art. 21(5) and against the inferred intentions (best interest) of both parties. The panel must take jurisdiction of RESPONDENT's defensive claim as counterclaim to avoid acting contrary to the aim of the Swiss rules.

89.

d. Even if the panel does not consider 21(5) broad enough to encompass counterclaims procedurally, RESPONDENT's defensive claim is as materially the same as a set off.

Regardless of whether the panel interprets the provision of 21(5) appropriately wide or not, or whether the panel considers the connection between the contracts as close enough to fall in the scope of the arbitration agreement, the result of the panel's conclusion shows merely in the amount to be considered, not in whether to consider the claim at all. As stated above, the difference between a counterclaim and a set-off is only procedural, not material. 21(5) only determines how, not whether, a claim must be treated by the panel procedurally, but treat it - the panel must.

90.

Even if RESPONDENT has termed its defensive claim a counterclaim, a set-off is materially the same claim and procedurally an included lesser claim. The plain text of 21(5) states that "the panel shall have jurisdiction to hear a set off defence". This means, that the panel must consider a defensive unrelated claim as set-off, thus limiting the monetary award to an amount equal to the underlying claim. The text does not say "shall only hear a set-off defence when it is unrelated" and is thus not limited materially to only the enumerated example. Thus, the panel can take jurisdiction of RESPONDENT's claim as set-off.

91.

e. There is no unfairness in the panel deciding RESPONDENT's claim.

CLAIMANT propounds that allowing RESPONDENT's defence would be unfair. RESPONDENT can find no unfairness in applying the rules both parties chose freely at the outset. Allowing the parties to save time and arbitration cost by letting them settle all matters between them at once would streamline the process and in the interest of both parties would thus allow them to resume their ordinary course of business faster. The rules were made without bias and are the most objective way to resolve this conflict.