TWELFTH ANNUAL

WILLEM C. VIS

INTERNATIONAL

COMMERCIAL ARBITRATION MOOT

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MEMORANDUM FOR CLAIMANT

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2004-2005

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW
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WHITE PLAINS, NEW YORK
U.S.

Swiss Chamber of Commerce

MOOT CASE No. 12

LEGAL POSITION

ON BEHALF OF

Mediterraneo Confectionary Associates, Inc. (CLAIMANT)

121 Sweet Street,
Capitol City
Mediterraneo

AGAINST

Equatoriana Commodity Exporters, SA. (RESPONDENT)

325 Commodities Avenue
Port City
Equatoriana

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INDEX OF ABBREVIATION

Art.	Article
Arts.	Articles
CISG	United Nations Convention on Contract for the International Sales of Goods of 11 April 1980
Ltd.	Limited
No.	Number
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p.	Page
pp.	Pages
Para.	Paragraph
USD	United States Dollars
UNCITRAL	United Nation Commission on International Trade
UNCITRAL Model Law	Model Law of the United Nation Commission on International Trade on International Commercial Arbitration
v.	Versus (against)

STATEMENT OF FACTS

19 November 2001 --- Mr. Smart (Equatoriana Commodity Exporters, S.A.) telephoned Mr. Sweet (Mediterraneo Confectionary Associates, Inc.) and offered to sell cocoa beans. At the end of the telephone, it was agreed that Equatoriana Commodity Exporters, S.A. would sell 400 metric tons of cocoa beans to Mediterraneo Confectionary Associates, Inc. During the period January to February 2002 Equatoriana Commodity Exporters, S.A. was to fix a delivery date that would be between the months of March to May 2002. The price was set at the current market price on 19 November 2001 of USD .5628 per pund , which was equivalent to USD 1,240.75 per metric ton. The total contract price for the 400 metric tons was USD 496,299.55. The contents of their conversation was confirmed in the fax and written contract. (Claimant's Exhibit No.1 and 2)

24 February 2002 --- Equatoriana Commodity Exporters, S.A. had not yet fixed a shipping date for the cocoa beans. Mr. Smart wrote to Mr. Sweet that a storm had hit the cocoa producing area in Equatoriana, on 14 February 2002 and that the Equatoriana Government Cocoa Marketing Organization announced that no cocoa will be released for export during the month of March, at the least. (Claimant's Exhibit No.3)

5 March 2002 --- Mr. Sweet wrote to Mr. Smart that the contract did not require specifically for Equatoriana cocoa and that the source was completely irrelevant to Mediterraneo Confectionary Associates, Inc. It also noted that although Mediterraneo Confectionary Associates did not need to receive the contracted cocoa immediately, they will be under immediate pressure later in the year. If cocoa had not been delivered by then, they would have to look elsewhere and look to Equatoriana Commodity Exporters, S.A. for reimbursement of any additional costs that they may incur. (Claimant's Exhibit No.4)

10 April 2002 --- Mr. Sweet wrote to Mr. Smart that Mediterraneo Confectionary Associates, Inc. expected Equatoriana Commodity Exporters, S.A. to deliver all of the cocoa by the end of May 2002. (Claimant's Exhibit No.5)

7 May 2002 --- Mr. Smart set a telefax indicating that Equatoriana Commodity Exporters, S.A. will deliver 100 metric tons of cocoa beans later that month.

18 May 2002---100metric tons of cocoa beans was shipped to Mediterraneo Confectionary Associates, Inc. by Equatoriana Commodity Exporters, S.A..

June-July 2002---Mr. Sweet called Mr. Smart a number of times during this period, inquiring as to the date when the additional 300 metric tons of cocoa would be delivered.

15 August 2002 ---Mr. Sweet wrote to Mr. Smart that Mediterraneo Confectionary Associates, Inc. would soon need to receive delivery of the remaining 300 tons of cocoa, and if Equatoriana Commodity Exporters, S.A. was unable to fulfill its obligation, Mediterraneo Confectionary Associates, Inc. would have to purchase elsewhere.

24 October 2002 --- Mediterraneo Confectionary Associates, Inc. purchased 300 tons of cocoa beans from Oceania Produce Ltd. at the then current market price of USD 2205.26.

25 October 2002 --- The cover purchase was notified to Equatoriana Commodity Exporters, S.A. by means of fax and letter. In the letter, Mediterraneo Confectionary Associates, Inc. made a claim for the excess amount. (Claimant's Exhibit No.8)

11 November 2002 --- Mr. Fasttrack sent a letter to Mr. Tender demanding the sum of USD 289,353, representing the extra expense that it suffered though Equatoriana Commodity Exporter's failure to fulfill its obligation. (Claimant's Exhibit No.9)

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PART Ⅰ Whether Equatoriana Commodity Exporters, S.A. was excused from delivering the 300 tons by reason of the embargo placed on the export of cocoa by the Equatoriana Government Cocoa Marketing Organization from mid-February to early November 2002

1. Our conclusion for PART Ⅰ is clearly: Respondent was not excused form delivering 300 tons of cocoa because of the embargo on the export of cocoa announced by the Equatoriana Government Cocoa Marketing Organization from mid-February to early November 2002.

2. The following reasons draw this conclusion: The contract was concluded and Respondent had an obligation to deliver the 400 metric tons of cocoa beans by the end of May 2002. However, Respondent only delivered 100 metric tons of cocoa beans on 18 May 2002, and did not make any deliveries for the remaining 300 metric tons before the end of May, when it was due. Therefore, Respondent still had an obligation to deliver the remaining 300 metric tons of cocoa to Claimant unless parties had concluded to rescind the contract. Although Respondent asserted exemption from his obligation to deliver the rest of the cocoa, because of the embargo on the export of cocoa, the article for exemption cannot be applied in this case. Consequently, Respondent was not excused from his obligation to deliver the remaining 300 metric tons of cocoa.

3. We will examine the argument above in the following order:
   1 The CISG governs the contract between Claimant and Respondent
   2 The contract was concluded
   3 The cocoa required in the contract was not limited to cocoa from Equatoriana
   4 Respondent was not excused from delivering 300 tons of cocoa because of the embargo

Ⅰ－1 The CISG governs the contract between Claimant and Respondent

4. As provided in Art.1 (1)(a) of the CISG, the CISG is applied to contracts for the sale of goods between parties whose places of business are in different states and when the states are contracting states. In this case, cocoa

contract 1045 is an international contract for sale of cocoa, the parties have the place of business in different States, Equatoriana and Mediterraneo, and both Equatoriana and Mediterraneo are parties to the CISG [Problem p.4 para.17]. Therefore the CISG governs the contract between Claimant and Respondent.

Ⅰ－2 The contract was concluded

5. There are no arguments among them about the fact that Mr. Harold Smart, account executive for Respondent, telephoned Mr. James Sweet, commodity buyer for Claimant, on 19 November 2001 and both of them agreed that Respondent would sell 400 tons of cocoa to Claimant at the end of the telephone conversation [Problem p.2 para.3, Claimant's Exhibit No.1]. Therefore, the contract between Claimant and Respondent was concluded at the end of the telephone conversation based on the Arts.23 and 24 of the CISG.

Ⅰ－3 The cocoa in the contract was not limited to cocoa from Equatoriana

6. Before we examine whether the Respondent was excused from delivering the remaining 300 tons of cocoa beans, first we should recognize the Respondent's obligation for delivery. Art.30 of the CISG states that the seller must deliver the goods as required by the contract and the CISG. Namely, it is the contents of the contract that decides the contents and the scope of the seller's obligation for delivery, and the CISG works in supplement, in case parties fix no rule about the obligations for delivery. Therefore the contents of the contract should be examined in order to determine the obligations for the seller.

Ⅰ－3－1 The contents of the Cocoa contract 1045

7. The Claimant's Exhibit No.2, which is the written contract for the cocoa contract 1045, included the following contents:
   - Respondent will sell 400 metric tons of cocoa beans

- the price will be USD 1,240.75 per metric ton for a total of USD 496,299.55
- during the months of January to February 2002 Respondent will fix and notice a delivery date, between the first and last days of March to May 2002
- the cocoa is to be of standard grade and count
- delivery will be in one or more instalments at the option of the seller

8. Although parties did not argue whether the above contract was concluded, there are arguments about the contents of the contract, especially whether the contract anticipated the cocoa from Equatoriana or not. Therefore, we will discuss this issue next.

Ⅰ－3－2　Whether the contract required cocoa from Equatoriana

9. Our view of this problem is that the cocoa contract 1045 did not anticipate cocoa from Equatoriana. This is because the written contract did not specifically call for cocoa from Equatoriana [Claimant's Exhibit No.2, written contract] and there is no reason for assertion of the Respondent.

10. Respondent admitted that the written contract did not specifically call for cocoa from Equatoriana. However, Respondent emphasizes that there is no doubt that both Respondent and Claimant contracted in regard to cocoa from Equatoriana. Respondent states two grounds for this: One of them is that the greater part of Respondent's business are exportation of commodities from Equatoriana, and the other is that the fact that there was no deviation from the basic price indicates that the contract envisaged cocoa coming from a country in category C [Respondent's Exhibit No.1].

11. However, both the reasons asserted by Respondent do not deny the fact that the cocoa could have been from anywhere.

Ⅰ－3－2－1 The fact that Respondent dealt mostly with commodities from Equatoriana does not mean that the cocoa in this contract had to be from Equatoriana

12. As indicated by statements made by both parties, Respondent primarily trades commodities produced in Equatoriana. However, on occasions it had dealt with commodities produced in other countries. [Procedural Order No.2 Question 14] If Respondent could not deal with cocoa from other countries constantly, it cannot be denied that parties of the contract would expect to deal with Equatoriana cocoa only. However, in this case there were possibilities for Respondent to trade cocoa produced in other countries, as suggested above, and therefore the fact that a large part of Respondent's business were exportation of commodities from Equatoriana cannot be a reason for arguing that cocoa contract 1045 anticipated the sale of cocoa specifically from Equatoriana.

Ⅰ－3－2－2 The fact that there was no deviation from the basic price indicates that the contract envisaged cocoa coming from a country in category C does not mean that the cocoa in this contract had to be from Equatoriana

13. In the cocoa contract 1045, there is no specification about the producing district of cocoa. The contract only prescribes that the cocoa is to be of standard Grade and Count. Therefore, Claimant pointed out that the cocoa contract 1045 did not call for Equatoriana cocoa specifically.

14. However, Respondent requests the Tribunal to find that the contract was for the sale of cocoa from Equatoriana. Respondent agreed that the written contract did not provide specifically for Equatoriana cocoa, but pointed out that parties contracted in regard to cocoa from Equatoriana. The points of Respondent's statement is as follows: There is no doubt that both Mr. Sweet and Mr. Smart contracted in regard to cocoa from Equatoriana, because there is a fact that the price for the cocoa under the cocoa contract 1045 did not deviate from the basic price, which indicates that the contract

anticipated cocoa to come from a country in category C, where Equatoriana belonged.

15. It is clear that cocoa from Equatoriana belongs to category C. However, it is also clear that many other countries belong to category C. This means that the fact that Equatoriana belongs to category C only suggests that the cocoa that is to be exported should be within cocoa from those countries and no other category.

16. Therefore, the fact that cocoa from Equatoriana belongs to category C does not mean that the cocoa in the contract 1045 had to be from Equatoriana.

17. For the reason stated above, Respondent has an obligation to deliver 400 metric tons of “cocoa” to Claimant.

18. In addition, there is no argument about the time for delivery. That is to say, the contract required Respondent to deliver the cocoa by the end of May.

19. As mentioned above, Respondent had an obligation to deliver 400 tons of cocoa, by the end of May.

Ⅰ－4 Respondent was not excused from delivering 300 tons because of the embargo

20. Respondent delivered only 100 tons of cocoa on 18 May 2002. There is no argument about this fact. Although Respondent executed the obligation for delivery partially, he still was obliged to deliver the remaining 300 tons of cocoa by the end of May in principle.

21. However, Respondent requests the tribunal to find that he was impeded through no fault of its own from delivering during the period February to November 2002 more than 100 tons of the 400 tons contracted [problem p.29].

22. We will first insist that Respondent was not excused from the delivery by reason of the embargo. Then, We will examine the reason.

Ⅰ－4－1　The condition of exclusion from delivering 300 tons of cocoa

23. Respondent did not deliver the remaining 300 tons of cocoa by the end of May 2002. In order to justify the failure of delivery, Respondent claimed the existence of embargo announced by the Equatoriana Government Cocoa Marketing Organization during the period 22 February to 12 November 2002 and asserted the possibility of exemption under Art.79 of the CISG. Therefore we will examine whether Art.79 gives a basis for being excused from the delivery.

24. Art.79 (1) provides that “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”

25. There are no arguments that an object of exemption under Art.79 is only for damage claims [Schlechtriem p.603 paras.6-9,Honnold p.474 para423.4] So, if we apply Art.79 formally, a party cannot be excused from performance under Art.79.

26. However, when the failure to perform is caused by an impediment for which the seller can claim exemption under Art.79, we should interpret that the buyer has no right to require performance. This is because it would be inconsistent to allow a buyer to require performance where performance is prevented by an impediment which, by virtue of Art.79, the seller is not required to overcome [Schlechtriem p.378 para.11].

27. Therefore, if the conditions of Art.79 are fulfilled, the Respondent will be excused from the obligation to deliver the 300 tons of cocoa. Therefore, next we will examine the condition of Art.79.

Ⅰ－4－2　The conditions of Art.79 were not fulfilled

28. Art.79(1) provides that (a) the failure was " due to an impediment beyond his control" ;(b) at that time of the contract the party "could not reasonably be expected to have taken the impediment into account"; and (c) subsequent to the contract the party could not reasonably be expected " to have avoided or overcome the impediment or its consequences.

29. The embargo corresponds to "impediment beyond his control." Because it is the Government that decided on the embargo, and was beyond the Respodent's control.

30. At the time of the cocoa contract 1045, both parties could not be expected to have taken the embargo into account, because the embargos caused by the storms cannot be anticipated usually. In addition, Storms occur in Equatoriana, as they do in most places,[Procedural Order No.2 Question No.8] meaning that storms as large as the one in this case did not occur frequently.

31. So, points of issues are limited to the argument about element (c) of Art.79. It is the issue whether Respondent proves that he could not reasonably be expected to have overcome the impediment or its consequences. The wording and purpose of Art.79 clearly indicates that the obligor has the burden of proof. Therefore, if Respondent is not able to prove those facts, he cannot assert the exemption. Next we will examine whether Respondent had proved that he could not reasonably be expected to have overcome the impediment or its consequences.

32. Respondent insists that the contract anticipated the sale of cocoa from Equatoriana, but, for the reason stated above, cocoa contract 1045 did not anticipate the sale of cocoa from Equatoriana. Therefore, unless Respondent proves that he could not purchase cocoa from another country, he was not excused, meaning he still has the obligation to deliver the remaining 300 tons of cocoa.

33. However, Respondent only proves that Equatoriana belongs to the lowest price category. In addition, Respondent could trade cocoa produced in other countries [procedural order No.2 Q.14] and other countries were not affected by the storm [procedural order No.2 Q.9]. The above facts show that Respondent could purchase cocoa from other countries. Consequently, Respondent could not prove the impossibility to purchase cocoa from another country.

34. Therefore, since the condition of Art.79 is not fulfilled, Respondent could not assert exemption based on Art.79.

35. That above, Respondent was not excused from delivering the 300 tons of cocoa.

PART Ⅱ　Whether Claimant can claim damages.

Ⅱ－1　Claimant can claim damages under Art.74 and Art.75

36. According to the cocoa contract 1045 (Claimant's Exhibit No.2), the Respondent was obliged to deliver four hundred metric tons net of cocoa beans between the first and last days of March to May 2002, which were to be fixed by the Respondent during the months of January and February 2002.

37. However, the Respondent not only failed to fix the delivery dates during the months given in the cocoa contract 1045, but also failed to deliver three hundred metric tons of cocoa out of the four hundred that was agreed in the contract.

38. Consequently, the Claimant was forced to purchase three hundred metric tons of cocoa beans from else where, at the current market price then. As the market price of cocoa beans had risen since the time of the cocoa contract 1045, this cover purchase caused the Claimant damages.

39. When a seller fails to perform any of his obligations under the contract or the CISG (Art.30 CISG), the buyer is given the right to claim damages provided

in Arts.74 to 77 (Art.45 (b) CISG).

Ⅱ－1－1　Relationship between Art.74 and Art.75

40. In this case, Art.74 which is the general rule for claiming damages and Art.75 which entitles damage claims after avoidances of contracts shall come into consideration.

41. Art.75 is oriented towards the satisfaction of the promisee's primary interest in performance. It is applied when there is a substitute transaction after the avoidance. It complements the general rule for claiming damages which is provided in Art.74. According to Art.75, as long as the factors are satisfied, the promisee who had made a substitute transaction is entitled to demand damage costs that have occurred without proving the foreseeablility of the damages, normally required when applying Art.74.

42. As to the complementary nature of Art.75, in cases where Art.75 cannot be applied, the promisee may claim damages under Art.74.

Ⅱ－2　Claimant was justified in making a cover purchase on 24 October 2002 under Art.75 and therefore may claim damages

Claiming damages under Art.75

43. Art. 75 provides that if there is an avoidance of contract and a substitute transaction is made, the party claiming damages may claim the difference between the contract price and the price of the substitute transaction.

Ⅱ－2－1　There was an avoidance of contract under Art.73 by 24 October 2002 at the latest

Avoidance of contract

44. In order to claim damages under Art.75, there must be an avoidance of contract before the substitute transaction.

Avoidance in instalment contracts (Art.73)

45. The contract agreed by Claimant and Respondent planned for the total of 400tons of cocoa beans to be delivered in a few shipments. This means that the contract was an instalment contract.

46. In instalment contracts, “if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment” (Art.73).

Ⅱ－2－1－1 The non-delivery by the Respondent led to a fundamental breach of contract on 31 May 2002

Fundamental breach (Art.25)

47. Art.25 provides that “A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”.

48. In this case, 300 metric tons of cocoa was not delivered by the end of May 2002. As it can be seen from this, the main obligation for Respondent to deliver the cocoa was not preformed, this obviously deprived Claimant of what he was entitled to under the contract.

49. Therefore, the non-delivery of the 300tons of cocoa led to a fundamental breach by Respondent.

Ⅱ－2－1－2 The notice for declaration of avoidance of the contract was conducted implicitly in the letter of 25 October 2002 from Mr. Sweet

Notice to the other party (Art.26)

50. Art.26 applies for avoidances under Art.73, providing that avoidances must be declared to the other party with a notice. However, by virtue of the general principal in Art.11, a declaration does not need to be concluded in or evidenced by writing and is not subject to any other requirements as to form. Therefore, declarations of avoidances may be made in writing or orally.

51. As long as the declaration is made to the other party directly, meaning for example not through the press or any other kind of indirect conducts. There must be clarity and precision in regard to the addressee's identity.

52. Whether the declaration must always be made explicitly or whether it could be done implicitly, it is not made clear within the article. However, the whole point of requiring a notice of avoidance to the other party is to make them aware that the contract has been avoided. This means that as long as the notice is sent out in a way that enables the other party to become aware of the avoidance, it is good enough for that notice to be considered as a notice required in Art.26. Therefore, notices can be done by implicit conducts. [Schlechtreim p.188 para.9-10]

53. In this case, in the letter dated 25 October 2002 [Claimant's Exhibit No.8], Mr. Sweet mentions the fact that Claimant had made a substitute transaction and that they expect Respondent to pay for the damages due to their breach of contract. This means that they were no more expecting Respondent to perform their obligation to deliver the remaining 300tons of cocoa beans and in replacement they expect a payment for the damages caused by it. As this letter implicitly shows that Claimant was no longer expecting Respondent to perform, it should be thought that it was a notice for declaration of avoidance of the contract.

54. In the case of Art.73, the notice of avoidance does not have to actually reach

the promiser. This is referred to Art.27 which provides that, “unless otherwise expressly provided in this Part of the Convention, if any notice request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive the party of the right to rely on the communication”.

55. Therefore, it can be said that the notice for avoidance of the contract was made on 25 October 2002, in the letter that was sent from Mr. Sweet to Mr. Smart [Claimant’s Exhibit No.8] and therefore the contract was avoided on the 25 October 2002.

Ⅱ－2－2－1 Although the substitute transaction took place before the avoidance of the contract, Art.75 may still be applied and Claimant may claim damages under Art.75

Substitute transaction after the avoidance

56. Art.75 requires a substitute transaction after the avoidance of a contract. This makes it clear that the substitute transaction must be a substitute for the primary contract and not something that coincidently occurred. However if this is the aim of Art.75, there may be exceptions made where, for example, a buyer who has not received delivery of goods and needs the goods for its own use. Here, the buyer should be able to make a sub-purchase and claim for damages under Art.75 even though the contract had not been avoided at the time of the sub-purchase.[Schlechtriem p.574 para.2]

57. In this case, although the contract had been in breach, Claimant had not sent out a notice to declare avoidance. However, a substitute transaction had been made on 24 October 2002, as shown in the letter of 25 October 2002 by Mr.Smart, and a notice of declaration was made shortly after that transaction. The time between the breach and the notice only shows the efforts by Claimant to stick to the primary contract as much as possible. Therefore in this case, Claimant may claim damages under Art.75.

Ⅱ－2－2－2 The substitute transaction was made within reasonable manner and time

Within reasonable manner

58. Damage claim under Art.75 is only permitted if the substitute transaction was made in a reasonable manner. It will be so if, when concluding the transaction, the promise acted as a careful and prudent businessman and observed the relevant practice of the trade concerned.[Schlechtriem p.576 para.7-9]

59. In this case, Claimant bought the substitute cocoa from Oceania Produce Ltd. at the then current market price of USD2205,26. This purchase was for cocoa beans from the same grade as Equatoriana and it was purchased at the lowest price that Claimant could purchase at the time. There was always the danger that market prices may continue to rise and consequently the difference between the primary contract price and the substitute contract price to increase. In that sense, the substitute transaction on 24 October 2002 can be considered reasonable.

60. Therefore, it can be said that under the circumstances that Claimant was in need of cocoa beans and could not take the danger to wait no longer, the substitute trans action was made within reasonable manner.

Within reasonable time

61. The party entitled to damages must carry out the substitute transaction within a reasonable period after avoiding the contract. This also depends on circumstances. If the goods have a commodity exchange or a market price, the period will normally be shorter than in other cases.

62. In this case, the substitute transaction was made on the 24 October 2002 and avoidance of the contract was made on 25 October 2002. Therefore, the time between the to actions are close enough.

Ⅱ－2－3　There were no exemptions for the Respondent

Exemption (Art.79)

63. As mentioned in the first part of this memorandum, Art.79 cannot be applied to this case and therefore there were no exemptions for the Respondent.

Ⅱ－2－4　Conclusion

64. Claimant may claim damages under Art.75

Ⅱ－3－1　Even if Claimant does not claim damages under Art.75, he may still claim damages under Art.74

Claiming damages under Art.74

65. As to the complementary nature of Art.75, in cases where Art.75 cannot be applied, the promisee may claim damages under Art.74.

66. Art.74 defines the extent of damage that can be claimed as a result of a breach of contract. Therefore, in order to claim damages, there must be a breach of contract by one of the parties.

Ⅱ－3－2　Respondent was obligated to deliver 400tons of cocoa beans by the end of May 2002 and there was a breach of contract as a result of Respondent not delivering the remaining 300tons of cocoa beans by the end of May 2002.

Breach by the Seller (Art.30 and 45)

67. Art.30 provides that “The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention”. In regard to this, it is clear that a seller in a contract has obligations in accordance with the contract as well as the CISG.

68. In the cocoa contract 1045 [Claimant’s Exhibit No.2], signed by both parties, Respondent was to deliver 400metric tons net of cocoa beans between the first and last days of March to May 2002. Unfortunately, Respondent only managed to ship 100tons of cocoa beans on 18 May 2002, as indicated in the telefax on 7 May 2002 [Claimant’s Exhibit No.6]. After this delivery, nothing was shipped during the month of May, still leaving Respondent with the obligation to deliver the remaining 300tons of cocoa beans to Claimant.

69. It is clearly mentioned in the contract that the delivery dates were to be set between March and May 2002. Although Respondent did not set any dates for delivery during the period of time that he was supposed to, it was obvious that the deliveries were due by the end of May 2002, at the latest. This was also mentioned in the letter of 10 April 2002 [Claimant’s Exhibit No.5] This letter of 10 April 2002 also indicates that there were no extensions for the time of performance for the Respondent.

70. Therefore, the fact that Respondent did not deliver the remaining 300tons of cocoa beans by the end of May 2002 results as a breach of obligation under the contract by the seller.

71. Under Art.45 (1)(b), a breach by the seller gives the buyer the right to “claim damages as provided in articles 74 to 77”.

72. As a result, in this case, Claimant may claim damages under Art.74.

PARTⅢ　Proper amount of the damages that can be claimed.

Ⅲ－1　Claimant may claim the sum of USD 289,353, being the difference between the contract price for the 300tons of cocoa of USD372,225 and

the cover price of USD 661,578

73. As seen in Part 2, Claimant may claim damages under Art.75 and if not, complementarily under Art.74.

Ⅲ－1－1　The sum of USD 289,353 may be claimed under Art.75

Damage claim under Art.75

Concrete calculation

74. The promisee is to be provided with reasonable protection under the rules for claiming damages if he satisfies his contractual interest himself in the event when the promisor fails to perform the contract. The promisee can therefore calculate his contractual interest concretely by reference to a substitute transaction if he has actually performed such a transaction. [Schlechtriem p.574 para.2] Therefore, when claiming for damages under Art.75, it may be done irrelevantly to the foreseeability of the damages at the time of the contract.

Ⅲ－1－2　Burden of proof

75. As foreseeability does not come into account, the party claiming damages does not have to prove this.

Ⅲ－1－3　Conclusion

76. Under concrete calculation, the promisee may claim the price of the actual damage that he has suffered.

77. Therefore, in this case, Claimant may claim for the difference price of USD 289,353.

Ⅲ－2　The sum of USD 289,353 may also be claimed under Art.74

Damage claim under Art.74

78. Concrete calculation is also used under Art.74. Therefore, only actual and definable losses are to be taken into account.

Ⅲ－2－1　The rise of the market price was foreseen or ought to have been foreseen by the Respondent

Foreseen damages

79. Under Art.74, damages that can be claimed by the promisee “may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the lights of the facts and matters of which he then knew of ought to have known, as a possible consequence of the breach of contract”.

80. In this case, Respondent had been in the business since 1961. Therefore he ought to have known at the time of the contract that the prices of cocoa beans went up and down and that when the prices rose, it could go very high up as in June 1977.

81. Art.77 suggests that the party claiming damages must mitigate the loss as much as possible. In this case, Claimant bought the substitute cocoa at the market price. Although it happened to be a higher price than the original contract price, it was still bought at the market price and in addition, there was always the danger of the market price to keep on rising. Therefore, Art.77 does not operate in this case and Claimant is still in the position to claim damages fully of USD 289,353, which is the price difference between contract price and the substitute transaction price.

Ⅲ－2－2　Burden of proof

82. In comparison to claiming damages under Art.75, where the promisee does not have to prove the foreseeability of the damages, the promisee must prove that the damages were foreseeable in order to claim damages under Art.74.

83. Here, as proved above, Respondent was or should have been able to foresee the damages that can be caused by its non-delivery at the time of the contract.

Ⅲ－2－3　Conclusion

84. Therefore, Claimant may claim USD 289,353. This is the cost difference for 300tons of cocoa beans, between the market price on 24 October of USD 661,578 and the primary contract price of USD 372,225, as claimed.

PARTⅣ　Procedural Issues

Ⅳ－1　The Arbitral Tribunal has Jurisdiction to hear the claim of Claimant in regard to the cocoa contract, and the award issued by the tribunal would be enforced by each of the parties' own countries.

Ⅳ－1－1　Applicable Procedural Law: The Swiss Rules the UNCITRAL Arbitration Rule and　UNCITRAL Model Law Govern this Proceeding.

85. This arbitration Proceeding is commenced by the Rules of Arbitration of the Chamber of Commence and Industory in Geneva, under the rules of the Swiss Rules on International Arbitration ("Swiss Rules"). [Claimant's Exhibit No.2]. The chamber of commerce and industry of Geneva as well as the Chamber of commerce of Base, Bern, Ticino, Vaud and Zurich have adopted

the new Swiss Rules of International Arbitration ("Swiss Rules"), which entered into force on January 1st, 2004. The Swiss Rules unify and harmonize the arbitration rules of the above-mentioned Chambers of Commerce and replace the Chamber's existing Rules in the field of international arbitraition.(Letter of Swiss Chamber's Arbitration to the parties on August 13, 2004)

86. Therefore, the Arbitration Rules of the Swiss Rules will govern the procedure of this arbitration.

Ⅳ－1－2 Application of UNCITRAL Arbitration Rules

87. Swiss Rules (in its introduction para. (b)) imply that the rules are based on the UNCITRAL Arbitration Rules. There are some changes but it is minimum. Therefore the tribunal would take into account to the UNCITRAL Arbitration Rules and its Commentary.

Ⅳ－1－3 Application of UNCITRAL Model Law 1

88. The UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") will also apply to these proceedings. The arbitration without amendments or additions. [Claimant's Statement Of Case III. Arbitration Clause, Applicable Law. para15] Due to the different nationalities of Claimant and Respondent this arbitration qualifies as an "international commercial arbitration" under UNCITRAL Model Law Art.I. Therefore, the UNCITRAL Model Law and those Swiss Rules not in conflict with it are the governing procedural law in this dispute.

Ⅳ－1－4 This Arbitral Tribunal has the Authority to Rule on its own Jurisdiction.

89. Pursuant to UNCITRAL Model Law Art 16 and Swiss Rule Art 21(1), this tribunal has the authority to rule on its own jurisdiction. Additionally, general principles of Competentz/Competentz empower this Tribunal to do so. (See. Red book of UNCITRAL)

90. Finally, neither Claimant nor Respondent disputes the authority of this Tribunal to rule on its own jurisdiction in regard to claim of Claimant.

Ⅳ－2 The Arbitration Clause is Valid and Grants Jurisdiction to This Tribunal.

91. The arbitration clause contained in the last paragraph of the Claimant's Exhibit No.2 on 23 November 2003, is valid. According to UNCITRAL Model Law Art. 7, the only two requirements to produce a valid arbitration agreement are (1) the intent of the parties to submit disputes to an arbitration proceeding, and (2) a writing between the parties. (UNCITRAL Model Law, Art. 7). Both elements here have been fulfilled. Furthermore, neither party disputes the application or validity of the present arbitration clause.

Ⅳ－3 The award issued by the tribunal would be enforced under the UNCITRAL Model Law and the New York Convention.

92. UNCITRAL Model Law Art. 35 (1) (2) provides, an arbitral award, irrespective of the country in which it was made, shall be recognized and enforced subject to the provisions of these articles. Danubia, Equatoriana and Mediterraneo are party to the Convention on the Recognition and Enforcement of Foreign Awards (New York Conventions). Any award issued will be enforced by the convention.

PART Ⅴ Whether the tribunal has jurisdiction to consider the counter-claim.

The tribunal does not have jurisdiction to consider the counter-claim.
Respondent requests the tribunal to order Claimant to pay the cost of the sugar contract as a counter-claim. But this tribunal does not have jurisdiction to hear the claim. This is because the counter-claim has no concern with this tribunal, since there was no agreement between the parties, and also because Swiss Rules Art.21 (5) does not apply to the counter-claim.

Ⅴ－1 Agreement by both parties

Ⅴ－1－1 A valid consent by the parties is required in an arbitral tribunal

93. There is no doubt that this tribunal has jurisdiction to hear the claim raised by Claimant. However, the tribunal should not hear the counter-claim.
94. This is because procedures for arbitral tribunals should always come under agreement by both parties. This is the main aim for solving disputes under arbitral tribunals. Therefore, valid consents by the parties are required in arbitral tribunals. [Redfern & Hunter p.260 5-25]
95. Both parties never agreed to discuss the sugar contract in the same tribunal as the cocoa contract. The sugar contract has its own arbitration clause in its contract. The parties had also agreed as follows: “any disputes arising with respect to or in connection with this agreement shall be finally decided by three arbitrators in Port Hope, Oceania in accordance with the Rules of Arbitration of Oceania Commodity Association in English.”[Respondent Exhibit No.4]

Ⅴ－1－2 The arbitration clause of both contracts are independent. In addition, both parties had agreed on each arbitration clause when the contract was concluded.

96. This tribunal is constituted under the arbitration clause between Claimant and Respondent in the cocoa contract. The sugar contract has another arbitration clause. Arbitral tribunals and its procedures require the consent of both parties. But there was no agreement to discuss the sugar contract in the same arbitration as the cocoa contract, under the arbitration clause of the cocoa contract.

Ⅴ－2 Provision of the Arbitration Rules

Ⅴ－2－1 Model Arbitration Clause

97. In regard to whether this tribunal has jurisdiction on the counter-claim, Swiss Rules and the UNCITRAL Arbitration rules adopted a broad arbitration clause in the provision which provided that, “any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be resolved by arbitration…”[Preamble of Swiss Rules and UNCITRAL]

98. The provision implies the necessity of “claim arising out of or relating to this contract”. In this case, the counter-claim obviously does not arise out of any relation to this contract, so therefore the counter-claim cannot be discussed in this tribunal.

Ⅴ－3－3　Art. 21 (5) of Swiss Rules provides;

99. That “the Tribunal has jurisdiction to consider this dispute pursuant to Article 21 (5) of the Swiss Rules,” “The arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause or it the object of another arbitration agreement or forum-selection clause.” According to Art.21 (5), the arbitral tribunal can hear the counter-claim when it’s purpose is a set-off. However in this case, the counter-claim raised by Respondent does not fulfill this requirement because the counter claim is independent from the cocoa contract and its main purpose is not to gain a set-off but to request for the money claim from the sugar contract.

Ⅴ－2－2－1　Methods for interpreting arbitral rules for counter-claims and set-offs

100. Disputes and claims that are outside the arbitration contract cannot be decided in the same arbitration procedure because arbitrations are procedures that are practiced in accordance to arbitration contracts. Therefore in the same way, counter-claims and set-offs may only be included in the same procedure if it occurred from the same contract as the primary claim. Otherwise, by putting a claim that doesn’t have an arbitration contract together with a different claim that has a arbitration contract, it would become possible to have arbitration on both claims, which would be against the original aim of the arbitration.

101. Claims that have become irrevocable as well as claims that are already being considered cannot be put forward as counter-claims or set-offs. This is because these claims should be decided within the original procedure.

102. In comparison to set-off defenses that are to be dealt with within the amount that the Claimant has put forward for arbitration, counter-claims are independent claims that could be other than money claims and will continue to be dealt with even when the Claimant withdraws its original claim.

103. Moreover, pleas for arbitration that had risen from different disputes, meaning cases where arbitration contracts differ, are not counter-claims in this sense. It should be seen as a different plea for arbitration between the same parties. These kinds of pleas should be considered as individual pleas and therefore should not be decided in the same procedures. Arbitrators are selected in different individual procedures and would be put forward individually.

Ⅴ－3 In addition to the point mentioned above, the counter-claim clearly contradicts to the fact that Respondent had put forward its claim as a set-off in the first place

104. Respondent made a counter claim under Art.21 (5). However Respondent requested its counter claim in regard to the sugar contract as follows;

105. “Order Mediterraneo Confectionary Associates, Inc. to pay the full contract price of UDS 385,805;
Order Meditterraneo Confectionary Associates, Inc. to pay interest on the price of USD 385,805 from 18 December 2003 to the date of payment”[Answer to Notice of Arbitration and Counter-Claim, Relief Requested para.19]

106. It is clear that the Relief Requested, requiring for a payment for the sugar contract, is incoherent to the appeal for the application of Art.21 (5) of the Swiss Rules. If the purpose of the counter-claim was for a set-off, Respondent must have requested a sum equal to of the amount that would

be put forward as a set-off, in its Relief Requested. Since in this case, Respondent had put forward the amount equal to the amount for the sugar contract, it can be said that his intentions were to make a counter-claim and not a set-off.

PART Ⅵ Whether if the tribunal has jurisdiction to consider the counter-claim, the recovery would be limited to a set-off against any recovery that Claimant might recover in regard to the cocoa contract.

The recovery should be limited.

107. As noted above, this tribunal is not expected to hear the counter-claim or order to Claimant to pay the full sugar contract price of USD 385,805.

108. Naturally it is unusual to admit jurisdiction to a counter-claim that has a different arbitration clause.

109. Nevertheless, if the tribunal accepts to discuss about the counter-claim or the set-off in the same tribunal as the cocoa contract, the only acceptation possible would be under Art. 21(5).

110. Therefore the recovery should be limited within the range of the set-off. The maximum sum of the claim by the Respondent would be USD 289,353.

PART Ⅶ Conclusion of the procedure issue.

Claimant respectfully submits the order to this arbitral tribunal.
This arbitral tribunal adopts the following claim;
-that this tribunal has jurisdiction to hear the claim raised by Claimant
-that this tribunal does not have jurisdiction to hear the counter-claim raised by Respondent.
-that even if the tribunal has jurisdiction to hear the counter claim, the recovery will be limited to the sum of the set-off (USD 385,805)

PART Ⅷ Claimant's request in this arbitration

Request For Relief

In view of the above submissions of law and fact, Claimant hereby respectfully request the tribunal:

- to find that Respondent was not excused from the delivery of 300 tons of cocoa by reason of the embargo

- to order Respondent to pay Claimant the sum of USD 289,353

- to order Respondent to pay interest at the prevailing market rate in Claimant on the said sum from 24 October 2002 until the date of payment

- to find that the tribunal does not have jurisdiction for the counter-claim

- to find even if the tribunal can hear the counter-claim, and whether the amount should be limited within the range of the set-off

- to award Respondent all costs of this arbitration

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