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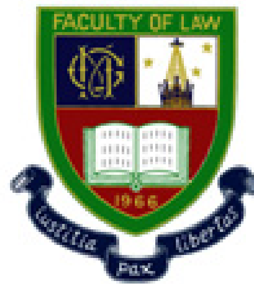
MEMORANDUM FOR RESPONDENT



Yuki Fukuyama
Akira Igarashi
Yuriko Kazama

MEIJI GAKUIN UNIVERSITY
SCHOOL OF LAW

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List of Abbreviation

A.N.	Answer to Notice of Arbitration and Counter-Claim
Art	Article
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
C.E.	MCA's Exhibit
CLOUT	Case Law on UNCITRAL Texts
ECE	Equatoriana Commodity Exporters, S.A.
EGCMO	Equatoriana Government Cocoa Marketing Organization
LIFFE	London International Financial Futures and Options Exchange
MCA	Mediterraneo Confectionary Associates, Inc.
No.	Number
p.	page
para.	Paragraph
P.O.	Procedual Order
R.A.	Request for Arbitration
R.E.	Respondent's Exhibit
Swiss Rules	Swiss Rules of International Arbitration 2004
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	The UNCITRAL Model Law on International Commercial Arbitration
UNIDOROIT	International Institute for the Unification of private Law
USD	United States Dollars

Index of Authorities

FERRARI,LECHTNER,BRAND	The draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention Sellier European Law Publishers GmbH/Sweet &Maxwell, London, 2004 (Cited as: Draft UNCITRAL Digest)
BERGAR, KLAUSE	"Set-Off in International Economic Arbitration" Arbitration International, Vol.15, No.1 (1999) (Cited as: Bergar)
PIERRE KARRE	"Arbitration Saves! Costs: Poke and Hide-and-Seek" Journal of International Arbitration, Vol.3, No.1 (1986)
C.JAUFFRET SPINOSI	UNIDOROIT Working Group For The Preparation Of International Commercial Contracts (2000) http://www.unidroit.org/english/publications/proceedings/2000/study/50/50-62bis-e.pdf
BIANCA,C.M.&M..J.BONELL (EDITORS)	Commentary on the International Sale Law: The 1980 Vienna Sales Convention. Milan: Giuffere, 1987 (Cited as: Bianca/Bonell)
HONNOLD, JOHN	Uniform Law for International Sales Kluwer Law International, 3rd Ed.1999 (Cited as: Honnold)
SCHLECHTRIEM, PETER (EDTOR)	Conmmntary on the UN Convention on the International Sale of Goods (CISG)

	Oxford: Clarendon Press, 1998 (Cited as: Schlechtriem)
SECRETARIAT COMMETARY	Guide to CISG Article 8 URL: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-08.html (Cited as: SC)

Index of cases

Amtsgericht Oldenburg in Holstein, 5 C 73/89 of 24 April 1990

Bundesgerichtshof; VIII ZR 51/95 of 3 April 1996
CLOUT Case No. 171
http://www.uncitral.org/en-index.htm

Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry

Rechbank's Hertogenbosch, the Netherlands, 2 October 1998 ; International Chamber of Commerce, International Court of Arbitration Arbitral award published in 1993, case No. 7197

Statement of Purpose

The ECE, Equatoriana Commodity Expoters, S.A.(ECE), has prepared this Memorandum in compliance with Procedual Order No.1 issued by the Arbitral tribunal on 1 October 2004.

It is argued that:

-this tribunal has jurisdiction to consider ECE's counter-claim;

-the recovery would not be limited to a set-off against all recovery that MCA might recover in regard to the cocoa contract;

-ECE is not liable for non-delivering the 300 tons of cocoa under CISG;

-MCA did not effectively avoid the contract;

-If ECE is found liable, damages are less than what MCA claims, USD 172,026;

Statement of fact

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 call, 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 pound , 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 a fax and a written contract. (MCA'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 had announced that no cocoa would be released for export during the month of March, at the least. (MCA's Exhibit No.3)

5 March 2002 --- Mr. Sweet wrote to Mr. Smart that the contract did not specifically require 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 would 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 might incur. (MCA'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. (MCA's Exhibit No.5)

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

18 May 2002---100metric tons of cocoa beans were 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. (MCA'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. (MCA's Exhibit No.9)

20 November 2003 ---Equatoriana Commodity Exporters, S.A. concluded the Sugar Contract 2212 which contained an arbitration clause calling for arbitration by three arbitrators in accordance with the Rules of Arbitration of the Oceania Comodity Association.

4 December 2003 --- The sugar was in good condition when turned over to the Oceania Shipping Lines.

15 December 2003 --- MCA received the sugar that was wet and had become

contaminated and could no longer be used for confectionary purposes. Therefore, MCA refused to pay the contract price.

5 July 2004 --- MCA sent notice of Arbitration to Swiss Chambers' Arbitration in Geneva, Switzerland.

10 August 2004 --- ECE sent answer to arbitration included a Counter-claim pursuant to Sugar Contract 2212 in order to claim contract price and its interest

31 August 2004 --- MCA sent answer to Counter-claim.

Arguments

Ⅰ. This tribunal has Jurisdiction to hear this dispute

Ⅰ－1　The Swiss Rules and the UNCITRAL Model Law govern this Proceeding.

This arbitration proceeding is commenced under the rules of the Swiss Rules of International Arbitration. Therefore, the Arbitration Rules of Swiss Rules (Swiss Rules) will govern the procedure of this arbitration.

The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) will also be applied to these proceedings. The UNCITRAL Model Law has been adopted by Danubia, the suits of this arbitration. Due to the different nationalities of MCA and ECE, this arbitration qualifies as an "international commercial arbitration" under UNCITRAL Model Law Art.1. Therefore, the UNCITRAL Model Law and the Swiss Rules do not conflict with each other, and therefore both may be applied in this dispute.

Ⅰ－2　This Arbitral Tribunal has the authority to rule on its own jurisdiction.

Pursuant to Swiss Rules Art 21(1) and UNCITRAL Model Law Art.16, this Tribunal has authority to rule on its own jurisdiction. In addition, general principles of Competence/Competense also empower this tribunal to do so. Finally, neither MCA nor ECE dispute the authority of this Tribunal to rule o its own jurisdiction.

Ⅰ－3　The Arbitral Tribunal would do with appropriate manner and equal treatment to the parties.

Swiss Rules Art.15(1) provides that the Arbitral Tribunal may conduct the arbitration with appropriate manner and equal treatment as a GENERAL PROVISION, and Art.18 in the UNCITRAL Model Law also provides such conduct with its mandatory provision.

Ⅰ－4　Enforcement of the award.

Danubia, Equatoriana and Mediterraneo are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Award [Notice from Chamber of Commerce and Industry of Geneva. Problem p.4]. If the tribunal issues the award for one party, the award would be enforced lawfully on their own country's litigation system. This is provided under Art.5.1(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.

Ⅰ－5 The Arbitration Clause in the contract is valid and grants jurisdiction to this tribunal

The Arbitral Clause for Cocoa contract was concluded on 23 November 2001. Then the parties had consent to comply with the Rules of Arbitration of the Chamber of Commerce and industry of Geneva, Switzerland when any dispute arose between them. The Swiss Rules belongs to the Chamber of Commerce and industry of Geneva. Switzerland. The Rule of the Chamber was replaced by the Swiss Rules. The chamber of commerce and industry of Geneva had adopted the new Swiss Rules which entered into force on 1 January 2004. (Problem, page 37, notice from Swiss Chamber's Arbitration) This means that the applicable Rule was changed from Geneva Rules to Swiss Rules automatically.

Ⅱ. Application of Swiss Rules

Ⅱ－1 . The parties consented to the adoption to Swiss Rules when the Swiss Chambers' Arbitration sent the notice to the parties.

Ⅱ－2 There was no agreement of the parties to exclude Swiss Rules Art.21(5).

Parties did not exclude Art.21(5) by agreement. This can be said firstly because they did not make any agreements to especially exclude such articles that may come up in the future that would give jurisdiction to set-offs. If both parties had intentions to definitely avoid articles such as Art.21(5) in the Swiss Rules, they should have made it clear when signing the contract. However in this case, there are no signs of such agreement.

In addition, mentioned above, both parties where aware of the fact that the rule that would be applied for arbitration would be the rule that is in force at the time of the dispute, on 1 November 2002 when the arbitral contract was concluded.

Even if, for some reason they were not aware of this, they would have known that Swiss rules would be applied in this tribunal from the notice they received from Swiss Chambers' Arbitration [Problem, p.37, notice from Swiss Chamber's Arbitration]. If they had any problems with this, they should have informed the Swiss Chambers of that when the notice was sent. According to the Problem, [P. O. No.2, clarification para.5] the adoption of the Swiss Rules was well published in interested circles and known by lawyers who engage in international commercial arbitration. The lawyer of the MCA should had known the change.

Under Art.3 and 7, Swiss Rules require the parties to submit answers to the notice if they wish for something else. Otherwise, their cooperation to the tribunal will simply be implied.

Since in this case MCA never brought up this issue at the time of the notice, it must be assumed that MCA agreed in having the whole of the Swiss Rules applied to this case.

Therefore there was no agreement between the parties to especially exclude Art.21(5) of the Swiss Rules.

Ⅱ－3　When applying a rule for arbitration, the whole rule must be applied and one cannot exclude just a part of it.

In its memorandum, MCA claims that, "[However,] because the parties chose to adopt the Geneva Rules, it should be inferred that the parties consciously chose to exclude provisions such as Swiss Rules Art.21(5)"(Para.19) . However, there are no facts that show the parties' intentions to exclude set-off defence that arises out of the arbitration clause.

The parties should have known that the applicable law may change in the future. Especially international laws, rules and conventions are frequently changed, replaced and improved in order to suite the contemporary situation of the world. These changes in the rules are foreseeable to parties who do business internationally.

Therefore, even if the applicable Rules which the parties chose at the time of the contract were different from the ones that were in force at the time of the

arbitration, the parties will still be bound by the new rules.

In fact, the Geneva Rules is still used by the parties that have consent to apply it and their arbitral Institute choose the Rules [P.O.No.2, clarification 5] but in the present case the Swiss Arbitration Chambers choose the Swiss Rules, and the parties did not claim about the adoption of the Rules. Therefore the parties have to comply with Swiss Rules and it's Art.21(5).

Ⅲ. Although the principle shows that if there are different arbitration clauses claims cannot be decided in the same arbitration tribunal, Art.21(5) of Swiss Rules gives jurisdiction to the set-off claim raised by ECE.

Ⅲ－1 The Principle of set-off claims and counter-claims

There is a principle that if a defence claim has a different arbitral clause, that defence claim cannot be discussed in the same arbitral tribunal that is already proceeding according to another arbitration clause. This principle applies in the same way for set-off claims and counter-claims. Therefore, from the principle, if there are different clauses for the counter-claim or set-off, they should be discussed in different arbitration tribunals.

In this case, the cocoa contract had an arbitration clause that said that the arbitration shall take place in Vindobona, Danubia and that it would be decided by three arbitrators in accordance with the Rules of Arbitration of the Chamber of Commerce and industry of Geneva, Switzerland [C.E., No.2]. On the other hand, the sugar contract had its own arbitration clause that said, any dispute between the parties shall be decided by three arbitrators in accordance with the Rules of Arbitration of the Oceania Commodity Association, in English [R.E., No.4]. From this, according to the principle given above, it may seem that the two arbitration tribunals must be decided separately.

Ⅲ－2 Art.21(5) gives an exception to the principle.

Art.21(5) provides "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…". This shows that even if there is a

different arbitration clause a claim may be discussed in the same tribunal as a defence. From this it can be said that the ECE's claim from the sugar contract may be decided in the same arbitration tribunal if it is put forward as a set-off defence.

Ⅲ－3 The aim of Art. 21(5) is to enable set-offs to be decided in the same arbitration so that the parties may solve the disputes between them easier.

One of the reasons that the Swiss Rules set a rule for set-offs even when there is a different arbitration clause, is because there were requirements for it from the civil law jurisdictions. Set-off was to be applied to all actions, irrespective of their procedural or substantial qualification in ancient Roman law (Berger, pp.53). Set-off provides fair procedure treatment for the parties, and the principle of equal treatment for both parties applies for arbitrations and therefore has a reason to be included in arbitration rules. In civil law countries, set-offs act as important remedies. For these reasons Art.21(5) was included and adopted by Swiss Chambers' Arbitration.

In Germany, Netherlands, Switzerland, Japan, Korea and Scandinavian countries, set-offs always require a declaration by one of the parties and it then lawfully effects the court. Swiss Rules would be affected by this principle of set-offs in the civil law countries. The applicable law in this tribunal is the Swiss Rules and the parties would be bound to the whole of the Swiss Rules including Art.21(5).

Ⅲ－4 There are precedents in international case law where a party has based his set-off defence on a cross-claim that arouse out of a contract closely related to the one in dispute.

German courts had acknowledged that due to the close link between the sales contract and the loan agreement, the arbitration agreement contained in the former extended to disputes arising out of the latter as well.

It is clear from the reasoning of the arbitrators that the extremely close connection between the contracts made it easy for the tribunal to confirm the admissibility of the set-off [Berger, p.91-99].

Ⅲ－5 There is a very close relationship between the cocoa contract and the sugar contract.

In order for the substantive approach to apply, the contracts must be closely connected. Judging whether a contract is sufficiently connected requires tribunal to consider all the circumstances of the case, as well as the wording of the arbitration agreement [Berger,Ⅳ].

The parties have a long-standing business relationship and they had a contract regarding the same food commodity namely for sweet. In the tribunal MCA claims the compensation to ECE and ECE claims the payment to the MCA. It is clear that the situation and the parties are closely connected substantially in the both of contracts. Although there are no agreements to admit set-off defences and counter-claims in the contract, this tribunal has power to determine the jurisdiction to the tribunal for both claims.

Ⅲ－6 In arbitral procedures and litigate procedures, set-off defence is a kind of defence that is allowed within the perspectives of Art.19 of the Swiss law. Some arbitration rules admit set-offs as counter claims by the reason of this provision (Zurich Rule Art.27, German-Swiss Chamber of Commerce Art.16, Basel Rules Art. 29, Ticino Rules Art.12).

The purpose of ECE's counterclaim is not to attack the MCA, but to mitigate the amount that has to be exchanged and paid between the parties. While set-offs and counter-claims are both meant to avoid a lengthening of actions, they remain vastly different [Berger/MCA memorandum para.35]. But in this case ECE does not have such intention. ECE's claim about set-off defense and counter-claims are for the meaning of the equitability and for saving interest and cost of arbitration. In the civil law systems, a declaration of set-off extinguishes the main right as payment would. Set-off belongs in the sphere of substantive law, and is also governed by the law that governs substance. Set-off is thus a defense against a claim, not a counter-attack [Pierre Karrer.p.35]. Switzerland and Equatoriana are civil law countries and in joint arbitrations such as in this case, set-offs and counter-claims should not be excluded because it is considered to be an attack or because lengthening of actions must be avoided such joint arbitration. In addition to mentioned above, the adoption of the set-off defense is recommended by UNIDOROIT' working group.

"If Unidroit decides to recommend the promulgation of rules relating to set-off, the following might form the basis of such a recommendation: That the set-off be considered as a doctrine of substantial, rather than procedural law. That the party which seeks to benefit from the set-off either has to declare it in court, [……], informing the other party of his or her intention. That the effective date of the set-off run [.….] That a requirement of creating an automatic set-off is that the debts involved be certain, liquid, fungible and payable." (C. Jauffret-Spinosi, p13)
The recommendation would be one of the reasonable reasons to admit ECE's set-off defense to the Arbitral tribunal.

Ⅳ. ECE is entitled to claim the full contract price arising from the sugar contract in this tribunal.

Ⅳ－1 The tribunal has jurisdiction to determine the whole of the claim from the sugar contract.

Art.21(5) of the Swiss Rules allows jurisdiction for the tribunal to hear set-off defences even though it is not within the scope of the arbitration clause. Even without this article, it is free for the tribunal to determine its own jurisdiction and include the set-off defence in the same arbitration tribunal if they think it is appropriate to discuss together.

Ⅳ－2 This tribunal can judge not only the claim from the cocoa-contract but also the claim from the sugar-contract.

This is because this tribunal has enough information about the business relationship between the two parties and the facts for their claims. It is true that MCA and ECE chose different arbitral rules at the time of each contract. However this was to have institutions that were specialized in relation to each contract. We can see this in MCA's arguments [MCA' memorandum para. 21].

In spite of this, there is necessity to judge whether the set-off defence and counter-claim can be discussed in the tribunal. In order to judge whether the tribunal has enough information about the sugar contract as a set-off, it must

look at the sugar contract. For this, ECE would submit facts for the sugar contract anyways.

The tribunal would determine whether there are advantages to judge the sugar contract in the same arbitration. If there were all of the exhibits that concern the dispute from the cocoa contract and the sugar contract, it will help the tribunal to make fair and proper award. In addition, if both claims were decided in the same arbitral tribunal, cost and time will be saved for both parties. By discussing both claims it would give the tribunal to make a fairer judgment.

>From this, there is jurisdiction for the claim from the sugar contract in the same tribunal as the claim from the cocoa contract. And therefore, this tribunal can discuss both claims and since it is going to look into the sugar contract, even if ECE has more to claim that to have to pay for the damages from the cocoa contract that would still be discussed under this tribunal.

Ⅴ Conclusion

As a conclusion of this Arbitral procedure:

-This tribunal has jurisdiction to hear the ECE's counter-claim
-The applicable law is the Swiss Rules and the Art.21(5) would apply to the
-ECE's set-off defense.
-The tribunal is expected to find the counter claim, the recovery would not be limited to a set-off against any recovery that MCA might recover in regard to cocoa contract.

Ⅵ MCA has the obligation to pay the full contract price to the ECE under Sugar Contract 2212.

The Contract was concluded in the manner of FOB. According to Incoterms 2000, A5 on Transfer risk, it provides, "seller […] bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the named of port of shipment." In the present case, the sugar did not get damage when the goods arrived in Medditeraneo. The receipt listed about condition as "Apparent good condition"[R.E. No.6].

It is clear that the damage occurred after the landing. The risk transferred to MCA when the sugar was loaded.Therefore MCA must pay the full contract price of the sugar to Redpondent.

MCA must pay the purchase price for the sugar to ECE. They must have known that when the sugar was damaged the goods were in circumstances of that the risks would be at MCA's responsibility.

The existence of the sugar contract shows that ECE's claim exists. ECE submitted the document for the sugar contract as well as the cargo receipt. The existence of these papers would be enough to judge the existence of the sugar contract and the risk that had passed on to MCA. The sugar was damaged after the landing. The risk should be owned by MCA.

Therefore ECE may claim for the purchase price of the sugar contract.

Ⅶ The United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG) governs Cocoa Contract 1045 between ECE and MCA

The CISG applies to contracts for the sale of goods between parties whose places of business are in different States when those States are Contracting States [Article1(1)(a) CISG]. The parties, MCA and ECE, have their places of business in different states, Mediterraneo and Equatoriana [Request for Arbitration (R.A.), para. 1, 2 ; Answer to Notice of Arbitration and Counter-Claim (A.N.), para 1, 2], and both Equatoriana and Mediterraneo are Contracting States [R.A., para17]. Additionally Cocoa Contract 1045 was for the sale of goods. Therefore, the CISG applies to Cocoa Contract 1045 under Art.1(1)(a) CISG.

Ⅶ－1 ECE has the remaining obligation to deliver 300 tons of cocoa that conforms with the contractual requirements.

ECE had the obligation to deliver 400 tons of cocoa beans under this contract [MCA's Exhibit (C.E.) No.2]. Since the contract acknowledged that delivery would be in one or more installments, at ECE's option [C.E.,No.2], ECE was permitted

to deliver the cocoa in installments. In accordance with that provision, ECE delivered 100 tons of cocoa which MCA received and paid for on 18 May 2002 [R.A., para.8 ; C.E., No.6] Therefore, ECE has the remaining obligation to deliver 300 tons of cocoa that conforms with the contractual requirements.

Ⅶ－2　ECE did not fail to perform its obligation to deliver the remaining 300 tons of Equatoriana cocoa

MCA asserts that the contract did not call for cocoa from Equatoriana [R.A., para.6 ; C.E. No.4], and ECE was in fundamental breach of Cocoa Contract 1045 by at least 24 October 2002 because ECE failed to deliver 300 tons of cocoa, which it was contractually required to do between the months of March and May 2002 [R.A., para.20]. However, ECE insist that (a) the contract did call for cocoa from Equatoriana, and (b) ECE did not fail to deliver.

Ⅶ－2－2 The contract called for the Equatoriana cocoa under the interpretation rules provided in Art.8 CISG

ECE and MCA concluded the contract for the sale of cocoa on 19 November 2001 [R.A., para.3; A.N, para.3]. Art.35(1) CISG provides that the seller is required to "deliver the goods which are of the quantity, quality, and description required by the contract." Therefore, ECE must deliver cocoa conforming with the contract to MCA.

MCA asserts that the contract did not specifically provide for Equatoriana cocoa [R.A., para.5 ; C.E. No.4]. However, although the written contract did not provide expressly require the cocoa from Equatoriana [C.E.,No.2], the contract anticipated that the cocoa would be from Equatoriana.

Art.8 CISG governs contract interpretation. It applies to the interpretation of the contracts terms in order to determine the meaning of the contract, it applies to the interpretation of statements and other conduct during the negotiation stage, such as an offer, an acceptance, an notice [Bianca.bonell.,p.95,97-98]. Therefore, the contract must be interpreted under Art.8 CISG in order to determine whether the contract required the cocoa from Equatoriana or not.

Ⅶ－２－２－２ MCA could not have been unaware of ECE's intent to deliver the cocoa from Equatoriana.

According to Art.8(1) CISG, "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Moreover, according to Art.8(3) CISG, in determining the intent of a party, all relevant circumstances of the case, such as the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties, should be considered properly.

ECE has been in business since 1961 [P.O.,No.13] and has never supplied anyone with cocoa from outside Equatoriana [P.O.,No.14]. Every sale of cocoa by ECE to MCA has been for cocoa that was produced in Equatoriana [A.N.,para.5].

In addition, the price of cocoa in the contract corresponds to Equatoriana cocoa, which belongs to Group C in the New York Board of Trade Cocoa Rules [R.E., No.1] or the fifth category in the Euronext LIFFE Cocoa Futures Contract, Exchange Contract No.401 [R.E.,NO.2]. Taking these circumstances into account, ECE intended that the intents to deliver the term "cocoa beans" in Cocoa Contract 1045, called for Equatoriana cocoa.

As MCA had purchased cocoa from ECE on a number of occasion before Cocoa Contract 1045 [R.A., para.3 ; C.E.,No.8] and those transaction had always been for Equatoriana cocoa [P.O., clarification No.14] even though the contracts simply used the term "cocoa", MCA could not have been unaware of ECE's intent that this contract would also be for Equatoriana cocoa. Therefore, under Art8(1) CISG, the contract must be interpreted according to ECE's intent. That is to say, the contract called for Equatoriana cocoa.

Ⅶ－２－２－３ Even if MCA did not know or could not have been unaware of ECE's intent, a reasonable person in MCA's shoes would have known ECE's intent

If the Tribunal finds that the parties' subjective intentions do not coincide, the objective meaning of their declarations must be determined by interpretating the contract using the standard provided in Art.8(2). According to Art.8(2), the

decisive test about the interpretation of the contract is how a reasonable person in the same circumstances as the party receiving the communication would have understood the other parties declaration.

MCA is a corporation which produces various confectionary items and sells those items throughout Mediterraneo and neighboring countries [R.A.,para.1 ; A.N.,1]. The reasonable person of the same kind as MCA, which is accustomed to international trade, has sufficient ability to understand the intent of other party. When determining how a "reasonable person of the same kind……in the same circumstances" would have interpreted the contract, the Tribunal should take into account as much as possible the specific facts of the case, such as hypothesizing that the reasonable person is in the same circumstances regarding knowledge of prior dealings between the parties [Bianca/Bonell, at Art.8, para.2.4]. Thus, here, a reasonable person in the same circumstance as MCA would have understood from the past practices of the parties and the similar wording of past Contracts that the intent of other party that ECE intend to deliver cocoa from Equatoriana under Cocoa Contract 1045. Therefore, the contract should be interpret as requiring Equatoriana cocoa.

Ⅶ－2－2－4 Delivery of Equatoriana cocoa constituted a practice established between the parties under Art.9(1) CISG

Since the parties, in the past, had engaged in many similar transactions, using contracts with the same wording [P.O., clarification 16] and had always used only Equatoriana cocoa [P.O., clarification 14], this use of Equatoriana cocoa constitutes a practice established between the parties within the meaning of Art.9(1) CISG. As such, the parties are bound by that practice for Cocoa Contract 1045 as well. Thus, according to Art.9(1), Cocoa Contract 1045 required that the beans as Equatoriana cocoa beans.

In the same circumstances as MCA, a reasonable person should understand that ECE had the intents to deliver the cocoa from Equatoriana in the cocoa contract 1045. Therefore, the contract called for the Equatoriana cocoa.

Ⅶ－3 Under Art.79 CISG, ECE is excused from liability for its failure to deliver the remaining 300 tons of cocoa.

In Procedural Order No.1, the President of the Tribunal requires us to discuss whether ECE was excused from delivering the remaining 300 tons of cocoa under the contract by reason of the embargo placed on the export of cocoa by the Equatoriana Government Cocoa Marketing Organization (EGCMO) from 22 February 2002 to 12 November 2002 [Procedural Order No.2, Clarification 10].

After the storm that hit the Equatoriana cocoa producing area on 14 February 2002, EGCMO announced that no cocoa would be released for export through the month of March 2002 at the earliest [Request for Arbitration para. 5, MCA's Exhibit No.3]. This embargo on cocoa exports prevented ECE from delivering the 300 tons of cocoa. Therefore, ECE insists that under Art.79 CISG, ECE is excused from liability for the non-delivery of the 300 tons of cocoa.

Ⅶ－3－1 All conditions of Art.79(1) CISG are fulfilled

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." The promisor is exempted if the failure to performance is (a) due to an impediment which is (b) beyond his control and also (c) unavoidable. In addition, (d) the impediment should have caused the failure to perform [Schlechtriem, p608 para.16]. The burden of proof to show that the requirements of Art.79(1) are fulfilled lies with the non-performing party [Honnold p.474], in this case, ECE. All conditions required by Art.79(1) CISG are satisfied, in this case, which is demonstrated by the reasoning below.

Ⅶ－３－１－１ The embargo placed by the EGCMO was the impediment

The UNCITRAL Working Group's introduction of the notion of "impediment" in the revised exemption clause was intended to ensure a narrow and objective interpretation of Art.79. Therefore, only objective or external circumstances can be considered to be impediments under Art.79 CISG, for example, natural, social, or political events, or physical or legal difficulties, such as a ban on exports or

imports [Schlechtriem, p.608 para.17 ; Bianca-Bonell, p579]. In this case, the embargo placed by the EGCMO, the government body, is an objective or external circumstance precluding ECE from performing its obligations under the Cocoa Contract. Therefore, that embargo is the “impediment” within the meaning of Art.79 CISG.

Ⅱ－３－１－２ The impediment was beyond ECE’s control

For a party to be exempt from liability under Art.79, the impediment must arise in an area outside the promisor’s control [Schlechtriem, p.610 para.20]. State intervention preventing performance, such as import or export bans, are, in general, outside a party’s control [Schlechtriem, p.21]. For example, an arbitral tribunal found that a prohibition on the export of coal implemented by the seller’s State constituted an impediment beyond the control of the seller [Arbitration Case 56/1995 of the Bulgarian Chamber of Commerce and Industry]. As EGCMO is a government body, the embargo that it placed on cocoa export arose outside of the ECE’s control. Therefore, the impediment was beyond ECE’s control for the purpose of Art.79(1).

Ⅶ－3－１－3 The impediment was unavoidable for ECE

Art.79(1) also requires that the impediment be unavoidable for a party. This means that the promisor 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 the impediment or its consequences [Schlechtriem,608.para.16].

Ⅶ－3－1－3－1 ECE could not reasonably be expected to have taken the embargo into account at the time of the conclusion of Cocoa Contract 1045

It is acknowledged that a promisor is responsible even for an impediment outside his sphere of control if he could reasonably have been expected to have taken it into account at the time of conclusion of the contract [Schlechtriem, p.611 para.23]. For example, in one case where the impediment was in existence and should have been known to the party at the time the contract was concluded, a party was not exempted from liability under Art.79 [Rechbank’s Hertogenbosch, the Netherlands, 2 October 1998 ; International Chamber of Commerce,

International Court of Arbitration Arbitral award published in 1993, case No. 7197].

The severe storm that hit Equatoriana caused the EGCMO to isseue the embargo on cocoa bean exports. While storms occur in Equatoriana, as they do in most places [P.O.No.2, clarification No.8], this was the first storm that caused extensive damage to the cocoa growing area. There had not been a storm nearly that severe in Equatoriana for 22 years, and even that storm did not cause extensive damage to the cocoa trees [P.O.No.2, clarification 8] As a such as the one that storm hit the cocoa growing area has rarely occurred in Equatoriana, any person, including ECE, could not reasonably foresee the embargo which resulted from that storm at the time of the contract, on 19 November 2002. Therefore, ECE could not reasonably be expected to have taken the embargo by the EGCMO into account at the time of the conclusion of Cocoa Contract 1045.

Ⅶ－3－１－3－2 ECE could not reasonably be expected to have avoided or overcome the impediment or its consequences

Even an unforeseeable impediment exempts the promisor only if it cannot be overcome by reasonable measures. Generally, the promisor is expected to overcome an impediment in order to perform the contract in the agreed manner, even where this results in him incurring greatly increased costs and a business loss [Schlechtriem, p.612 para.25]. However, as discussed above [see section 2-2-1], the contract called for "Equatoriana cocoa," which is not of the highest quality. This intention is important. Under Art.35(1), the seller has obligation only to deliver goods which are of the quality required by the contract. Therefore, the only cocoa that ECE was required to deliver was Equatoriana cocoa. Even though ECE theoretically could buy cocoa beans from another country, that cocoa did not match the quality of Equatoriana cocoa which was what the parties expected and what the contract required. Therefore, ECE could not be expected or required to buy the cocoa from another country in an attempt to overcome the embargo. Similarly, MCA might suggest that ECE should have requested an exemption in order to overcome the embargo. However, this was not a feasible solution, as every company requesting an exemption from EGCMO was rejected [P.O. No.2, clarification 12].

Ⅶ－3－2 ECE was not liable for a failure to perform during the period of the

embargo under Art.79(3)

Once a non-performing party is exempted from its liability under Art.79(1), Art.79(3) provides that "the exemption … has effect for the period during which the impediment exists." Therefore, ECE was exempted from its obligation to deliver the remaining 300 tons of cocoa until 12 November 2002, the date on which the embargo was rescinded [P.O. clarifications, 10].

Ⅶ－3－3 ECE gave proper notice to MCA regarding the impediment and its effect on ECE's ability to perform within a reasonable time after ECE knew of the Impediment.

According to Art.79(4), a non-performing party "must give notice to the other party of the impediment and its effect on his ability to perform" within a reasonable time. Here ECE notified MCA of the storm and subsequent embargo on cocoa exports on 24 February 2002 [C.E., No.3]. In addition, ECE indicated that the embargo would prevent ECE's ability to deliver cocoa until at least March 2002. The storm occurred on 14 February 2002 and the embargo was in place shortly thereafter. Additionally, the embargo was, at that time, only guaranteed to last through the month of march 2002. ECE had until May 2002 to deliver the cocoa within the contractual period. As such, there was no certainty that the embargo would completely impede ECE's ability to perform. Thus, ECE's letter to MCA explaining the situation was sent within a reasonable time in accordance with the requirements of Art.79(4). Therefore, ECE is not liable for damages under Art.79.

Ⅶ－3－4 MCA has no right to claim performance until 12 November 2002

Here, it is clear that ECE's failure to deliver the goods was caused by the embargo, which was an impediment beyond ECE's control, which ECE could not reasonable be expected to take into account at the time of the conclusion of the contract, and which ECE could not have avoided or overcome. Thus, ECE has mt its burden of proof to qualify fir an exemption of liability for its failure to perform under Art.79.

When the failure to perform is caused by an impediment for which the seller can claim exemption under Art.79, 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 the definition in Art.79, the seller is not required to overcome [Schlechtriem, p.378 para.11]. Therefore, since the conditions of Art.79 are fulfilled as discussed above, MCA's right to require ECE to deliver the remaining 300 tons of cocoa was suspended until 12 November 2002, the date on which the embargo placed by the EGCMO was rescinded.

Ⅷ MCA did not effectively avoid the contract.

MCA argues that it effectively avoided the contract. The possibilities for avoidance would be under Art.49 (1)(a) or Art.49 (1)(b). However, MCA was not justified in avoiding the contract under either of these Articles due to the reasons below.

Ⅷ－2 There was no breach of the contract committed by ECE

Art.33 CISG provides that the seller must deliver the goods by the due date set out in the contract. The parties can fix the delivery date under the principle of freedom of contract [Schlechtriem, p.261, para.1]. Any delivery after the due date is a breach of contract to which the rules of CISG on remedies apply. [Ferrari, Flechtner, Brand, p.623, para9 ; Schlechtriem p.357,para.5].

MCA and ECE agreed that the delivery date was to be determined at the seller's option [C.E.,No.2].This shows that this contract did not require an essential date for performance. If Claimant needed the cocoa by a certain date, obviously Claimant would not have left such an important part of the contract completely up to Respondent. In addition, it is clear from the later letters that were exchanged, that as long as the cocoa was in Claimant's hand before their supply was gone, late delivering it would not cause problems for Claimant [C.E., No.4, 7]. Therefore it can be said that in this case, it was clear to both parties that the delivery date was not essential to Claimant, and that as long as Claimant received the cocoa before its' supply was gone, the fact that Respondent did not set a date would not lead to a fundamental breach of contract.

Ⅷ－3 If ECE breached the contract , ECE did not fundamentally breach the contract, as defined by Art.25, and thus, the MCA was not entitled to avoid the contract.

MCA argues that ECE fundamentally breached the contract and that it was justified in avoiding the contract under Art.49. However, there were no fundamental breaches in this case.

Art.25 provides that in order for a breach to be a fundamental one, the party must be substantially deprived of what it was entitled to expect under the contract. However in the case at hand, the MCA did not suffer from a substantial deprivation.

First, according to the contract [C.E. No.2], the delivery date was to be set for some time between March and May 2002, to be determined completely at the seller's discretion. This shows that the contract did not require an essential date for performance. If MCA needed the cocoa by a certain date, obviously MCA would not have left such an important part of the contract completely up to ECE. In addition, it is clear from the later letters that were exchanged that as long as the cocoa was in MCA's possession before their supply was gone, late delivery would not cause problems for MCA [C.E.,No.4, 7]. MCA, therefore, expressed its preference for late delivery over non-delivery. Therefore it can be said that in this case, it was clear to both parties that the delivery date was not essential to MCA, and that as long as MCA received the cocoa before its supply was gone, ECE's late delivery would not lead to a fundamental breach of the contract.

Moreover, 25% of the contract goods had already been delivered on time (MCA's Exhibit No.6). While not complete, a delivery of one quarter of the cocoa out of the contracted 400 tons had been successfully delivered to MCA. This may lead to a partial breach of contract, however, since MCA did receive some of the contracted for goods in a timely manner, late delivery of the remainder of the goods cannot be considered a substantial deprivation.

Especially in this case, where the delivery date was not of primary importance to MCA and where MCA did not give ECE a final date by which it needed the goods, the facts demonstrate that timely delivery was not essential to MCA. German cases, such as Landgericht, 27 March 1996 Oldenburg and Oberlandesgericht, 28 February 1997 have found that when timely deliveries were essential to the buyer

or when parties have agreed on absolute time limit for delivery, late deliveries may lead to fundamental breaches. However in this case, it was clear to both parties that timely delivery was not essential. This shows that the late delivery of a part of the cocoa was not a fundamental breach.

In addition, MCA indicated in its letters of 5 March 2002 (MCA's Exhibit No.4) and 15 August 2002 (MCA's Exhibit No.7) that it was not under immediate time pressure to receive the cocoa and that it still had a remaining supply of cocoa it could use. This shows that even if the deliveries were late, it would not be too much of a problem for MCA, who had enough supplies to carry on its business.

Finally, in many cases, such as ICC court of Arbitration, Basel 1995 Arbitral Award, late delivery alone is not considered a fundamental breach. In order for a breach to become fundamental, or a breach that entitles a buyer to avoid the contract, the buyer must fix an additional period of time for performance, in accordance with Art.47 (1), and the seller would then have to fail to deliver within that time. See also Art.49 (1)(b).

It can be concluded from these reasons that in the case of late deliveries, the seller must know that timely delivery was important in order for the buyer to claim fundamental breach, otherwise late deliveries can only amount to avoidance of contracts when there are additional periods of time set in accordance with Art.47 (1) and 49 (1)(b).

In this case, ECE was aware that timely performance was not essential to MCA and therefore late delivery cannot amount to a fundamental breach.

Ⅷ－4 MCA never set an additional period of time for ECE to perform, as required by Art.47.

Under Art.47, the buyer may fix an additional period of time of a reasonable length within which the seller can perform its obligations. If an additional period of time for performance is set and that period of time passes without performance by the seller, this would lead to a seller's breach of his obligations, as well as enabling the buyer to avoid the contract under Art.49 (1)(b).

However, for the reasons below, in this case MCA did not set an additional period

of time for ECE to perform as required under Art.47, and therefore it cannot call for breach of contract by ECE nor avoid the contract under Art.49 (1)(b).

When fixing an additional period of time the buyer must stipulate performance by a particular date (Schlechtreim p.395-6). The words "we very much hope that the goods will arrive by 1 July" would be insufficient (Schlechtriem p.396-7). These words only indicate permission for the seller to postpone performance and do not constitute a notice for the seller warning him that the contract would be avoided if that period of time passes without his performance.

In this case, while MCA may have indicated that it wanted the goods delivered, it never specified a new delivery date for ECE. MCA did not fix a certain delivery date clearly enough to notify ECE that the contract would be avoided if the period of time passed without it's performance. This can be seen from the words "later this year" (MCA's Exhibit No.4) and "if we do not receive notification soon" [C.E., No.7]. Such words are too vague to convey the necessary urgency and strict parameters for additional performance.

German CISG cases such as Amtsgericht, 24 April 1990 Holstein indicate that, "in order to avoid the contract as provided in Art. 49(1)(b) CISG, the buyer had to fix an additional period of time for performance after each alleged non-delivery. As the buyer did not fix the additional period of time for performance, the court held that the seller was entitled to the full purchase price. ". For cases of late delivery, a buyer must set a nachfrist period before any breach can be found. Therefore since MCA had not set a nachfrist period, there can be no breach by ECE.

This seems also to be reflected in Art.49, where the contract may be avoided when an additional period of time for performance is set by the buyer, and that period of time passes without the seller's performance. The period of time set by the buyer, must be clear enough for the seller to foresee the possibilities of avoidance by the seller. In this case, there were no dates set by MCA that would warn ECE of the possibilities of avoidance.

At the very least, MCA should have contacted ECE before purchasing new goods. Because even if MCA were in need of cocoa, there was a contract between the two parties that ECE would supply cocoa for MCA and the fact that ECE had been

informing MCA that it would supply them with cocoa as soon as the government released additional cocoa to be exported. MCA was aware that ECE would be willing to supply the remaining 300tons of cocoa. In spite of this, MCA failed to inform ECE that it would be purchasing cocoa from elsewhere before actually purchasing the cocoa. As to this, MCA should not be able to claim breach of contract. ECE did not breach the contract, but it was MCA who went on and made another purchase out side the cocoa contract between MCA and ECE.

Ⅷ－5 The letters and telephone conversations prior to 15 November 2002 did not amount to avoidance, and therefore, MCA did not give proper notice of avoidance to ECE with these communications, which is required by Art. 26.

Nothing that came between MCA and ECE until 15 November 2002 mentioned the word "avoidance". If MCA wished to clearly avoid the contract, it would have used the word "avoidance" which would have made its intentions to avoid the contract clear. However MCA did not do so and therefore it is doubtful that it had intentions to avoid the contract before it made replacement purchases.

They were otherwise insufficient to be considered as avoidances because in all the letters from MCA use very general and conditional wordings. Each letter always referred to future times. This shows the intention of maintaining the contract between the parties.

According to Art.26, a declaration of avoidance is effective only if it is made by notice to the other party. However, as mentioned above, there was nothing that could be clearly referred to as a notice of avoidance to ECE in this case.

Ⅷ－6 The letter of 15 Nov. 2002 cannot be considered an avoidance comporting with the requirements of Art.49 (1)(b).

Since the ECE's late delivery was not a fundamental breach (which would otherwise allow the MCA to avoid the contract under Art.49 (1)(a)), we must look to Art.49 (1)(b) to determine whether MCA could avoid the contract.

Under Art.49 (1)(b), "The buyer may declare the contract avoided in the case of non-delivery, if the seller does not deliver the goods within the additional period

of time fixed by the buyer in accordance with paragraph (1) of Art.47 or declares that he will not deliver within the period so fixed."

Thus when late delivery or non-delivery does not constitute a fundamental breach the buyer must set an additional time period for performance (which the seller must, in turn, violate) before being able to avoid the contract.

Here, the MCA did not set an additional period of time in accordance with Art 47(1).

If, at the time of the avoidance letter, the MCA had set such a period the ECE would have been able to perform because the embargo was lifted on 12 November 2002.

Ⅷ－7 Avoidance should be the last-resort remedy according to a German BGH case.

Since avoidances lead to disadvantages for both parties, other remedies such as additional period of time for performances or damage claims should be considered in advance [CLOUT Case No. 171].

Likewise in this case, MCA should have first fixed an additional period of time for ECE before trying to avoid the contract, which it did not.

At the least, if MCA had acted reasonably and contacted the ECE before purchasing the replacement goods, MCA would have realized avoidance was unnecessary. Since by then, as stated in the letter of Mr. Smart of 13 November 2002 [C.E., No.10], there had been rumors for some time that the Equatoriana Government was planning to release additional cocoa, which it did on 13 November. It would have been possible for ECE to deliver the remaining 300tons of cocoa.

Ⅸ Damages, if ECE is found liable, are less than what MCA claims.

In the case where ECE is not exempted from delivering the remaining 300tons of cocoa because of the embargo, there are possibilities for MCA to claim for

damages under Art.45 (1)(b) and Arts.74 to 76. However, Arts.75 and 76 cannot be applied in this case, and even under Art.74, the amount of damages is much less than the amount that MCA has put forward. Below are the reasons for this.

Ⅸ－1 Art.75 cannot be applied in this case because MCA purchased the replacement goods without avoiding the contract.

Art.75 provides that if the contract is avoided, and if in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Art.74. This article is only applicable when a substitute transaction is made after the avoidance of a contract.

In this case, as mentioned above, there were no fundamental breaches by ECE nor any additional period of time for performance set by MCA. Therefore, MCA was not justified in avoiding the contract under neither Art.49 (1)(a) nor Art.49 (1)(b).

In addition, in order to effectively avoid a contract, one must give notice of avoidance to the other party (Art.26). However no notice was given to ECE that clearly indicates MCA's intention to avoid the contract.

Moreover, MCA made its substitute transaction with Oceania Produce Ltd. on 24 October 2002, and notified ECE of their purchase in their letter on 25 October 2002 (MCA's Exhibit No.8). Since MCA never effectively avoided the contract nor was it justified in avoiding the contract, the requirements of Art.75 are not fulfilled, and therefore this article cannot be applied on this case.

Ⅸ－2 Art.76 cannot be applied in this case because the contract was never avoided by MCA. MCA.

Art.76 provides that if the party claiming damages has not made a purchase or resale under Art.75, he may recover the difference between the price fixed by the contract and the current price at the time of the avoidance as well as any further damages recoverable under Art.74.

In order for this article to be applied, in addition to the fact that a substitute purchase under Art.75 has not been made, the contract must be avoided.

In this case, although no purchase falling within the definition of Art.75 was made as shown above, there were no avoidances of the contract by MCA, as discussed earlier in the memorandum. This means that the requirements for applying Art.76 are not fulfilled and therefore Art.76 cannot be applied in this case.

Ⅸ－3　Under Art.74, damages cannot exceed the amount of loss that the party in breach (here, ECE) foresaw at the conclusion of the contract.

Art.74 provides that when there is a breach of contract by one of the parties, the other party may claim damages equal to the sum of the loss, including loss of profit suffered by the other party as a consequence of the breach. If it is found that there was a breach by ECE, MCA may claim for damages under Art.74.

However, under Art.74 such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. The facts that should be considered here are the ones he then knew or ought to have known, as a possible consequence of the breach. This shows that damages that can be claimed under Art.74 must be foreseeable at the time of the contract.

When a party in breach is late in making a delivery, the other party may claim for damages caused by this. However, even if a breach of contract leads to damages for the other party, the amount that can be claimed must be reasonable and if the damage cost exceeds unreasonably, that cost should be considered unforeseeable and beyond the scope of Art.74.

In this case the amount that can be claimed would be the difference between the contract price and the cover price. The contract price for the remaining 300tons was USD 372,225 (USD 1240.75 per ton). The cover price that MCA has claimed was USD 661,578 (USD 2,205.26 per ton). Therefore the damage cost that MCA has put forward in this case is USD 289,353.

However, the cover purchase made by MCA was at a very insufficient time since the market price for cocoa beans at that time was almost at an historic high. This can be seen from the chart provided in the Monthly Average Cocoa Prices 1971-2004(ECE's Exhibit No.3). As mentioned above, if the damage cost that a party is claiming exceeds its normal cost unreasonably, that cost should be considered unforeseeable. Here, for the past ten years (1991-2001) the average cocoa prices have been more or less around US 50-60cents per pound. Since the contract price was set at US 56.28cents per pound, it can be said that it was set within the prices that one can predict from the past. In comparison, the cover purchase was made during October 2002 when the prices were almost the twice the time of the contract price. Being in the cocoa business for a while, one should be able to predict that if it waited a little, the prices would soon go down. Under these circumstances it can be said that the cost of the cover purchase exceeds the cost that one could foresee at the time of the contract greatly and therefore it is beyond the scope of Art.74.

MCA only gave notice to ECE of the transaction between them and Oceania Produce Ltd. after their cover purchase. By November 2002 the prices had gone down a little and not as high as twice the price of the contract price.

If MCA is justified in claiming for damages, the amount that it may claim would be limited to damages that can be considered foreseeable. And in this case that amount would be the average cocoa price in November 2002. Therefore, the proper amount that MCA may claim would be USD 172,026, being the difference between the contract price and the average cocoa price in November 2002.

Ⅸ－4 MCA did not mitigate its damages, as required by Art.77.

Under Art.77, a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss. If he fails to tale such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

A measure to mitigate loss is reasonable if, under the particular circumstances, it could be expected to be taken by a person acting in good faith. The conduct of a prudent person entitled to damages who is in the same position as the aggrieved party must be the reference point, with any relevant usages being taken into

account. [Schlechtriem, p.588-9] The measures for mitigating losses always requires a careful balancing of the parties' competing interests in the particular circumstances of each individual case.

In this case, MCA had the duty to mitigate its losses by three means. Firstly, the last contact that the parties had between them was the telephone call on 29 September 2002 from ECE to MCA. In this telephone call ECE explained the fact that there was no indication as yet as to when the export ban would be rescinded (P.O. No.2 Clarification, 22). In reply, MCA only reiterated the concerns expressed in its letter of 15 August 2002(MCA's Exhibit No.7). After this, MCA did not make any contact with ECE until after it had made a cover purchase from Oceania Produce Ltd. on 24 October 2002. It is unreasonable for MCA, which was still in contract with ECE, to go out and make a purchase elsewhere, without giving notice to ECE that it would do so and therefore it would mean that ECE would have to pay for damages that would occur because the market price for cocoa beans had risen since the contract between them. MCA should have mitigated the loss by contacting ECE before purchasing the replacement goods.

Secondly, there were rumors that the embargo would be lifted in the cocoa industry world-wide [P.O. Clarification, 29]. As the yearly requirements for cocoa of MCA average 1500metric tons [P.O. Clarification, 24], MCA should have been sensitive to news on cocoa. Especially when it was waiting for the embargo to be lifted so that it could receive cocoa from ECE, MCA should have been looking out for information on these issues. If it did so, MCA would have been aware that sooner or later the embargo would be lifted and would have known that here was no need for a cover purchase. In this sense, the fact that MCA did not look out for information on the embargo leads to the lack of mitigation of the loss.

Finally, the cover purchase that MCA made was at an historic high price. It had never been so high in the past ten years. Since MCA had been in the business for some time, it should have known that the price at the time of the cover purchase would not last long and therefore if it had waited a little longer the damage cost would not have had to become so expensive.

As shown above, MCA did not fulfill its duty to mitigate its losses. Therefore ECE may claim a reduction in the damages under Art.77.