TWELFTH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

2004 – 2005

MEMORANDUM

FOR

MEDITERRANEO CONFECTIONARY ASSOCIATES, INC.

- CLAIMANT -

THOMAS ARNTZ | DOMINIC BECKERS - SCHWARZ | BIRKE BREUER

JENNIFER BRYANT | ANNEGRET FOCKE | CHRISTINE KLEIN

UNIVERSITY OF COLOGNE

UNIVERSITY OF COLOGNE
LAW CENTRE FOR EUROPEAN AND INTERNATIONAL COOPERATION
(R. I. Z.)

CENTER FOR TRANSNATIONAL LAW
(CENTRAL)

TEAM MEMBERS:

THOMAS ARNTZ | DOMINIC BECKERS - SCHWARZ | BIRKE BREUER
JENNIFER BRYANT | ANNEGRET FOCKE | CHRISTINE KLEIN

TWELFTH ANNUAL
WILLEM C. VIS
INTERNATIONAL
COMMERCIAL ARBITRATION MOOT

2004 – 2005

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW
PACE UNIVERSITY SCHOOL OF LAW
WHITE PLAINS, NEW YORK
U.S.A.

MOOT CASE NO. 12

LEGAL POSITION

ON BEHALF OF

MEDITERRANEO CONFECTIONARY ASSOCIATES, INC.
121 SWEET STREET
CAPITOL CITY
MEDITERRANEO (CLAIMANT)

AGAINST

EQUATORIANA COMMODITY EXPORTERS, S.A.
325 COMMODITIES AVENUE
PORT CITY
EQUATORIANA (RESPONDENT)

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS VI
TABLE OF AUTHORITIES IX
INDEX OF COURT CASES XVI
INDEX OF ARBITRAL AWARDS XIX
INDEX OF LEGAL SOURCES XX
STATEMENT OF FACTS 1
FIRST ISSUE: CLAIMANT VALIDLY AVOIDED COCOA CONTRACT 1045 IN PART AND THUS IS ENTITLED TO RECOVER DAMAGES 4
A. CLAIMANT validly avoided Cocoa Contract 1045 in part. 4
I. CLAIMANT had the right to partially avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1) and 49 (1) (a) CISG. 5
1. CLAIMANT and RESPONDENT concluded a valid contract of sale pursuant to the CISG. 5
2. RESPONDENT committed a fundamental breach of Cocoa Contract 1045 pursuant to Art. 25 CISG. 5
a. RESPONDENT breached Cocoa Contract 1045. 5
b. RESPONDENT's conduct resulted in substantial detriment to CLAIMANT as required by Art. 25 CISG. 6
i. RESPONDENT's conduct caused loss of trust and thereby substantial detriment to CLAIMANT. 6
ii. Additionally, RESPONDENT's extreme delay in delivery caused substantial detriment to CLAIMANT. 7
iii. Moreover, RESPONDENT's conduct placed CLAIMANT in an untenable commercial position and therefore resulted in substantial detriment. 8
c. RESPONDENT foresaw or could have foreseen that its conduct would cause a substantial detriment to CLAIMANT as required by Art. 25 CISG. 9
II. Additionally, CLAIMANT was entitled to avoid Cocoa Contract 1045 partially, since RESPONDENT failed to deliver after CLAIMANT had fixed

an additional period of time pursuant to Artt. 51 (1), 45 (1) (a), 49 (1) (b) and 47 (1) CISG. 10
1. CLAIMANT fixed an additional period of time of reasonable length during which RESPONDENT failed to deliver. 10
2. RESPONDENT may not rely on the fact that no specific date was mentioned in the letter fixing the additional period of time. 11
a. CLAIMANT fixed an additional period of time pursuant to Art. 47 (1) CISG in accordance with a practice established between the parties. 11
b. To promote good faith according to Art. 7 (1) CISG this Tribunal should not require a specific date to "fix an additional period of time" under Art. 47 (1) CISG in this case. 12
III. Alternatively, if the Tribunal considers that Cocoa Contract 1045 called for delivery in instalments, CLAIMANT had the right to avoid the contract in regard to the outstanding instalment pursuant to Art. 73 (1) CISG. 13
1. RESPONDENT committed a fundamental breach pursuant to Art. 25 CISG in regard to the outstanding instalment by non-notification of the shipping date and non-delivery. 13
2. Alternatively, RESPONDENT committed a fundamental breach of contract pursuant to Art. 25 CISG by not delivering the outstanding instalment in the additional period of time fixed by CLAIMANT. 14
IV. CLAIMANT declared avoidance pursuant to Art. 26 CISG on 25 October 2002. 14
B. CLAIMANT is entitled to recover damages from RESPONDENT. 15
I. CLAIMANT has the right to recover damages in the amount of USD 289,353. 15
1. CLAIMANT can recover damages pursuant to Artt. 45 (1) (b) and 75 CISG. 15
a. CLAIMANT's cover purchase satisfies the requirements of a substitute transaction pursuant to Artt. 45 (1) (b) and 75 CISG. 16
b. RESPONDENT may not rely on the fact that CLAIMANT declared avoidance one day after it made the cover purchase as this was in a timely manner. 17
2. If this Tribunal finds that Art. 75 CISG is not applicable, CLAIMANT is entitled to recover damages pursuant to Artt. 45 (1) (b) and 76 CISG. 18

II. Alternatively, if this Tribunal finds that CLAIMANT declared avoidance on 11 November 2002, CLAIMANT is entitled to recover damages in the amount of USD 172,024 pursuant to Art. 76 CISG. 18
III. CLAIMANT acted in accordance with its duty to mitigate loss pursuant to Art. 77 CISG. 19
SECOND ISSUE: RESPONDENT IS NOT EXEMPT FROM PAYING DAMAGES PURSUANT TO ART. 79 CISG. 20
A. Neither the storm nor the export embargo imposed by the EGCMO constituted an impediment hindering RESPONDENT's performance, since RESPONDENT's delivery obligation was not restricted to Equatoriana cocoa beans. 20
I. The interpretation of Cocoa Contract 1045 pursuant to Art. 8 (2) CISG shows that RESPONDENT's obligation to deliver was not restricted to cocoa beans from Equatoriana. 20
II. RESPONDENT may not rely on its alleged intention to restrict its delivery obligation only to Equatorian cocoa beans pursuant to Art. 8 (1) CISG, since CLAIMANT could not have been aware of RESPONDENT's alleged intention. 22
III. No practice restricting RESPONDENT's delivery obligation has been established between the parties according to Artt. 8 (3) and 9 (1) CISG. 23
B. Even if Cocoa Contract 1045 covered only cocoa beans from Equatoriana, Art. 79 CISG does not exempt RESPONDENT from its obligation to deliver since it did not try to overcome the purported impediment. 24
THIRD ISSUE: THE TRIBUNAL HAS NO JURISDICTION TO CONSIDER RESPONDENT'S ASSERTIONS CONCERNING SUGAR CONTRACT 2212. 25
A. This Tribunal has no jurisdiction to consider RESPONDENT's assertions concerning Sugar Contract 2212 because this dispute is not covered by the arbitration agreement contained in Cocoa Contract 1045. 25
I. RESPONDENT's asserted claims do not fall within the wording of the arbitration clause contained in Cocoa Contract 1045. 26
II. This Tribunal should not extend the scope of the arbitration agreement in Cocoa Contract 1045 beyond its wording. 26
1. An extension of the scope of the arbitration agreement beyond the wording of the clause would violate party autonomy. 27

2. It would be particularly inappropriate to extend the scope of the arbitration agreement in this case, because the issues raised by RESPONDENT are expressly covered by the arbitration clause in Sugar Contract 2212. 27
3. The scope of the arbitration agreement should not be extended to include RESPONDENT's assertions, since this would violate the parties' right to appoint their arbitrators. 28
4. Considerations of procedural economy and efficiency do not compel a different result. 29

B. Art. 21 (5) Swiss Rules does not compel a different result because it is inapplicable in this case. 30

I. Art. 21 (5) Swiss Rules should not be applied since the parties did not agree upon its application. 31
II. Even if this Tribunal considers it desirable to provide for automatic extension of Art. 21 (5) Swiss Rules generally, it would be inappropriate to do so in this case because the parties selected specialized arbitration for disputes in connection with Sugar Contract 2212. 33

C. Even if Art. 21 (5) CISG applies, any recovery by RESPONDENT must be limited to a set-off defence against the amount of CLAIMANT's recoverable damages. 33

I. Art. 21 (5) Swiss Rules should not be extended from set-off defences to counter-claims, since these are fundamentally different legal devices. 34
II. Art. 21 (5) Swiss Rules should not be extended to counter-claims, since doing so would endanger the enforceability of the arbitral award. 35

REQUESTS FOR RELIEF 35

INDEX OF ABBREVIATIONS

§	Paragraph
Arb. Intl.	Arbitration International
Art.	Article
Artt.	Articles
ASA	Swiss Arbitration Association
BGH	Bundesgerichtshof (Federal Supreme Court, Germany)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
cf.	confer (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG-Online	Case Law on CISG http://www.cisg-online.ch
CLOUT	Case Law on UNCITRAL Texts http://www.uncitral.org/en-index.htm
e.g.	exemplum gratia (for example)
ECJ	European Court of Justice
EGCMO	Equatoriana Government Cocoa Marketing Organization
et seq.	et sequentes (and following)
Fn.	Footnote
Geneva Rules	Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland
i.e.	id est (that means)
ICC	International Chamber of Commerce
Inc.	Incorporated
IPRax	Praxis des Internationalen Privat- und Verfahrensrecht (Law Journal, Germany)

JBl.	Juristische Blätter (Law Journal, Austria)
LCIA	London Court of International Arbitration
LCIA Rules	Arbitration Rules of the London Court of International Arbitration
Ltd.	Limited
NJW	Neue Juristische Wochenschrift (Law Journal, Germany)
No.	Number
Nos.	Numbers
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958
NYBOT Rules	New York Board of Trade Cocoa Rules
OCA Rules	Rules of the Oceania Commodity Association
OGH	Oberster Gerichtshof (Supreme Court, Austria)
OLG	Oberlandesgericht (Higher Regional Court, Germany)
p.	Page
para.	Paragraph
paras.	Paragraphs
pp.	Pages
RIW	Recht der internationalen Wirtschaft (Law Journal, Germany)
S.A.	Sociedad Anónima
SchiedsVZ	Zeitschrift für Schiedsverfahren (Law Journal, Germany)
Sec.	Section
Swiss Rules	Swiss Rules of the Chamber of Commerce and Industry of Switzerland of 4 January 2004
TranspR-IHR	Transportrecht, Beilage „Internationales Handelsrecht“ (Law Journal, Germany)
U.S.	United States

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commision on International Trade Law of 21 June 1985
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2004
v.	versus (against)
Vol.	Volume
WM	Wertpapier-Mitteilung (Law Journal, Germany)
Y.B.	Yearbook

TABLE OF AUTHORITIES

Achilles, Wilhelm-Albrecht	Kommentar zum UN-Kaufrechtsübereinkommen (CISG). Commentary. Neuwied 2000. [Cited as: *Achilles*]
Babiak, Andrew	Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods. In: (1992) Temple International and Comparative Law Journal, p. 113. [Cited as: *Babiak*]
Baker, Stewart Abercrombie Davis, Mark David	The UNCITRAL Arbitration Rules in Practice. Deventer 1992. [Cited as: *Baker/Davis*]
Berger, Klaus Peter	Understanding Transnational Commercial Arbitration. Munster 1999. [Cited as: *Berger*]
Berger, Klaus Peter	International Economic Arbitration. Deventer/Boston 1993. [Cited as: *Berger in: International Economic Arbitration*]
Berger, Klaus Peter	Die Aufrechnung im internationalen Schiedsverfahren. In: (1998) RIW, p. 315. [Cited as: *Berger in: RIW 1998*]
Berger, Klaus Peter	Set-Off in International Economic Arbitration. In: (1999) Arb. Intl., Vol. 15, No. 1., pp. 53 et seq.. [Cited as: *Berger in: Arbitration International*]
Bianca, Cesare Massimo Bonell, Michael Joachim	Commentary on the International Sales of Law – The 1980 Vienna Sales Convention. Commentary. Milan 1987. [Cited as: *Bianca/Bonell – Author*]

Bonell, Michael Joachim	Die Bedeutung der Handelsbräuche im Kaufrechtsübereinkommen von 1985. In: (1985) JBl., pp. 387 et seq.. [Cited as: *Bonell in: JBl.*]
Brunner, Christoph	UN-Kaufrecht – CISG. Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980. Unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht. Commentary. Bern 2004. [Cited as: *Brunner*]
Chengwei, Liu	Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL. September 2003. [Cited as: *Chengwei*]
Chocosuisse	Chocology. The Swiss chocolate industry, past and present. 2001. http://www.cisg.law.pace.edu/cisg/moot/SwissChocolate.pdf. [Cited as: *Chocosuisse*]
Enderlein, Fritz Maskow, Dietrich	International Sales Law. Commentary. New York 1992. [Cited as: *Enderlein/Maskow*]
Enderlein, Fritz Maskow, Dietrich Strohbach, Heinz	Internationales UN-Kaufrecht. Commentary. Berlin 1991. [Cited as: *Enderlein/Maskow/Strohbach*]
Enderlein, Fritz	Die Verpflichtung des Verkäufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Verträge über den internationalen Warenkauf . In: (1991) IPRax, pp. 315 et seq.. [Cited as: *Enderlein in: IPRax*]

Ferrari, Franco Flechtner, Harry Brand, Ronald A.	The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues of the UN Sales Convention. Munich/London 2004. [Cited as: *Ferrari/Flechtner/Brand*]
Fouchard, Philippe Gaillard, Emanuel Goldman, Berthold	Fouchard, Gaillard, Goldman on International Commercial Arbitration. The Hague 1999. [Cited as: *Fouchard*]
Gross, Domenic	Das rechtliche Schicksal von Verrechnungsansprüchen im Schiedsverfahren. Vol. 2. Zurich 1999. [Cited as: *Gross*]
Herber, Rolf Czerwenka, Beate	Internationales UN-Kaufrecht. Commentary. Munich 1991. [Cited as: *Herber/Czerwenka*]
Hof, Jacomijn J. van	Commentary on the UNCITRAL Arbitration Rules. Commentary. The Hague 1991. [Cited as: *Van Hof*]
Holl, Volker H. Keßler, Oliver	Selbstgeschaffenes Recht der Wirtschaft und Einheitsrecht – Die Stellung der Handelsbräuche und Gepflogenheiten im Wiener UN-Kaufrecht. In: (1995) RIW, p. 457. [Cited as: *Holl/Keßler*]
Honnold, John O.	Documentary History of the Uniform Law for International Sales. Philadelphia 1989. [Cited as: *Honnold – Documents*]
Honnold, John O.	Uniform Law for International Sales under the 1980 United Nations Convention. 3rd edition. The Hague 1999. [Cited as: *Honnold*]

Honsell, Heinrich
Kommentar zum UN-Kaufrecht.
Commentary.
Berlin/Heidelberg 1997.
[Cited as: *Honsell – Author*]

Honsell, Heinrich
Vogt, Nedim Peter
Schnyder, Anton K.
International Arbitration in Switzerland.
Basel/Geneva/Munich 2000.
[Cited as: *Honsell/Vogt/Schnyder – Author*]

Karollus, Martin
UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis.
Vienna/New York 1991.
[Cited as: *Karollus*]

Keinath, Steffen
Der gute Glaube im UN-Kaufrecht.
Konstanz 1997.
[Cited as: *Keinath*]

Koch, Robert
The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale.
In: (1998) Review of the Convention on Contracts for the International Sale of Goods (CISG), pp. 177–354.
[Cited as: *Koch*]

Lew, Julian D. M.
Mistelis, Loukas A.
Kröll, Stefan
Comparative International Commercial Arbitration.
The Hague 2003.
[Cited as: *Lew/Mistels/Kröll*]

Lorenz, Alexander
Fundamental Breach under the CISG.
http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html.
Dinslaken/Canterbury 1998.
[Cited as: *Lorenz*]

Lurger, Brigitta
Die „wesentliche Vertragsverletzung“ nach Art. 25 CISG.
In: (2001) Internationales Handelsrecht (2001), p. 91.
[Cited as: *Lurger*]

Müller, Martin Lukas
Die Zuständigkeit des Schiedsgerichts.
In: (1997) Comparative International Commercial Arbitration, p. 153.
[Cited as: *Müller*]

Neumayer, Karl H.
Ming, Catherine
Convention de Vienne sur les contrats de vente internationale des marchandises.
Commentary.
Lausanne 1993.
[Cited as: *Neumayer/Ming*]

Peter, Wolfgang
Die neue Schweizerische Schiedsordnung – Anmerkung für die Praxis.
In: (2004) SchiedsVZ, pp. 57 et seq.
[Cited as: *Peter in: SchiedsVZ*]

Peter, Wolfgang
Some Observations on the Swiss Rules of International Arbitration.
In: (2004) ASA Special Series No. 22, pp. 9 et seq.
[Cited as: *Peter in: ASA*]

Piltz, Burghard
Internationales Kaufrecht:
Das UN Kaufrecht (Wiener Übereinkommen von 1980) in praxisorientierter Darstellung.
Commentary.
Munich 1993.
[Cited as: *Piltz*]

Raeschke-Kessler, Hilmar
Berger, Klaus Peter
Lehne, Hans K.
Recht und Praxis des Schiedsverfahrens.
Vol. 2.
Cologne 1995.
[Cited as: *Raeschke-Kessler/Berger/Lehne*]

Redfern, Alan
Hunter, Martin
Law and Practice of International Commercial Arbitration.
3rd edition.
London 1999.
[Cited as: *Redfern/Hunter*]

Reinhardt, Gert
UN-Kaufrecht.
Commentary.
Heidelberg 1991.
[Cited as: *Reinhardt*]

Rudolph, Helga
Kaufrecht der Export- und Importverträge.
Berlin 1996.
[Cited as: *Rudolph*]

Salger, Hanns-Christian
Lorenz, Manuel
Witz, Wolfgang
Internationales Einheitliches Kaufrecht.
Commentary.
Heidelberg 2000.
[Cited as: *Salger/Lorenz/Witz – Author*]

Schlechtriem, Peter
Schwenzer, Ingeborg
Kommentar zum Einheitlichen UN-Kaufrecht.
Commentary.
4th edition.
Munich 2000.
[Cited as: *Schlechtriem/Schwenzer – Author*]

Schlechtriem, Peter
Kommentar zum Einheitlichen UN-Kaufrecht.
Commentary.
3rd edition.
Munich 2000.
[Cited as: *Schlechtriem – Author*]

Staudinger, Julius von
Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen:
Wiener UN-Kaufrecht (CISG).
Commentary.
Revised edition.
Berlin 1999.
[Cited as: *Staudinger – Author*]

Tackaberry, John
Marriott, Arthur
Bernstein's Handbook of Arbitration and Dispute Resolution Practice.
Vol. 1.
4th edition.
London 2003.
[Cited as: *Bernstein – Author*]

Trommler, Andreas
Die Auslegung des Begriffs wesentliche Vertragsverletzung in Art. 25 CISG.
Frankfurt 2001.
[Cited as: *Trommler*]

Völker, Gregor
Vorvertragliche Pflichten und Gefahrtragung beim Unternehmenskauf.
Munich 2003.
[Cited as: *Völker*]

Weber, Max
Economy and Society.
Vol. 2.
Berkeley: University of California Press 1978.
[Cited as: *Weber*]

Weigand, Frank-Bernd
Practitioner's Handbook on International Arbitration.
Munich 2002.
[Cited as: *Weigand – Author*]

Zöller, Richard

Zivilprozessordnung.
Commentary.
20th edition.
Cologne 1997.
[Cited as: *Zöller – Author*]

INDEX OF COURT CASES

AUSTRIA

05.07.2001 OBERSTER GERICHTSHOF
6 OB II7/01A
CISG-Online Case 652
[Cited as: *OGH, 05.07.2001*]

EUROPEAN UNION

13.07.1995 EUROPEAN COURT OF JUSTICE
RSC – 341/93
Reprinted in: NJW 1996, 42
[Cited as: *ECJ, 13.07.1995*]

GERMANY

20.12.1972 BUNDESGERICHTSHOF, VIII. ZIVILSENAT
VIII ZR 186/70
Reprinted in: BGHZ 60, 85 et seq.
[Cited as: *BGH, 20.12.1972*]

24.05.1995 OBERLANDESGRERICHT CELLE, 20. ZIVILSENAT
20 U 76/94
CISG-Online Case 152
[Cited as: *OLG Celle, 24.05.1995*]

21.08.1995 LANDESGERICHT ELLWANGEN, 1. KAMMER FÜR HANDELSSACHEN
1 KfH O 32/95
CISG-Online Case 279
[Cited as: *LG Ellwangen, 21.08.1995*]

03.04.1996 BUNDESGERICHTSHOF, VIII. ZIVILSENAT
VIII ZR 51/95
CISG-Online Case 135
Reprinted in: NJW 1996, 2346 seq.
[Cited as: *BGH, 03.04.1996*]

28.02.1997 HANSEATISCHES OBERLANDESGERICHT HAMBURG, 1. ZIVILSENAT
1 U 167/95
CISG-Online Case 261
[Cited as: *OLG Hamburg, 28.02.1997*]

16.10.1997 BUNDESGERICHTSHOF, IX. ZIVILSENAT
IX ZR 164/96
Reprinted in: WM 1997, 2305 et seq.
[Cited as: *BGH, 16.10.1997*]

13.01.1999 OBERLANDESGERICHT BAMBERG, 3. ZIVILSENAT
3 U 83/98
CISG-Online Case 516
Reprinted in: TranspR-IHR 2000, 17 seq.
[Cited as: *OLG Bamberg, 13.01.1999*]

21.04.2004 OBERLANDESGERICHT DÜSSELDORF, I. ZIVILSENAT
I-15 U 88/03
CISG-Online Case 915
[Cited as: *OLG Düsseldorf, 21.04.2004***]**

ITALY

24.11.1989 PRETURA DI PARMA-FIDENZA
77/89
CISG-Online Case 316
[Cited as: *Pretura di Parma-Fidenza, 24.11.1989*]

SWITZERLAND

05.02.1997 HANDELSGERICHT DES KANTONS ZÜRICH
HG 950 347
CISG-Online Case 372
[Cited as: *Handelsgericht des Kantons Zürich, 05.02.1997*]

INDEX OF ARBITRAL AWARDS

00.00.1986 IRAN US CLAIMS TRIBUNAL
Computer Science Corp. v. Iran
Reprinted in: Iran US Claims Tribunal Reports, vol. 10, pp. 269 - 390
[Cited as: *Iran US Claims Tribunal, 1986*]

00.00.1992 INTERNATIONAL CHAMBER OF COMMERCE
Award No. 7197/1992
Reprinted in: JDI 1993, pp. 1028 ff.
[Cited as: *ICC Award No. 7197*]

00.00.1995 INTERNATIONAL CHAMBER OF COMMERCE
Award No. 8128/1995
CISG-Online Case No. 399
[Cited as: *ICC Award No. 8128*]

02.02.2000 TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY
Award No. 71/1999
CLOUT No. 475
[Cited as: *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 02.02.2000*]

INDEX OF LEGAL SOURCES

ARBITRATION RULES OF THE LONDON COURT OF INTERNATIONAL ARBITRATION
[Cited as: *LCIA Rules*]

ARBITRATION RULES OF THE UNITED NATIONS COMMISION ON INTERNATIONAL TRADE LAW OF 1976
[Cited as: *UNCITRAL Rules*]

CHAMBER OF COMMERCE AND INDUSTRY OF GENEVA, ARBITRATION RULES OF 1 JANUARY 1992
[Cited as: *Geneva Rules*]

NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958
[Cited as: *NY Convention*]

RULES OF ARBITRATION OF THE OCEANIA COMMODITY ASSOCIATION
[Cited as: *OCA Rules*]

SWISS RULES OF THE CHAMBER OF COMMERCE AND INDUSTRY OF SWITZERLAND OF 4 JANUARY 2004
[Cited as: *Swiss Rules*]

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
AS ADOPTED BY THE UNITED NATIONS COMMISION ON INTERNATIONAL TRADE ON INTERNATONAL COMMERCIAL ARBITRATION OF 21 JUNE 1985
[Cited as: *UNCITRAL Model Law*]

UNCITRAL SECRETARY GENERAL, ANALYTICAL COMMENTARY ON THE UNCITRAL MODEL LAW, UN DOC A/CN. 9/264, UNCITRAL, 18th SESSION [1985], 16 UNCITRAL Y.B. 104, PART TWO, I, B, COMMENTARY ON DRAFT
[Cited as: Doc. A/CN. 9/264]

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS) 2004
[Cited as: *UNIDROIT Principles*]

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS OF 11 APRIL 1980
[Cited as: *CISG*]

STATEMENT OF FACTS

2001

19 November MEDITERRANEO CONFECTIONARY ASSOCIATES, INC. [*hereafter: CLAIMANT*], represented by Mr. Sweet, orally concluded a contract of sale, Cocoa Contract 1045, with EQUATORIANA COMMODITY EXPORTERS, S.A. [*hereafter: RESPONDENT*], represented by Mr. Smart. This contract was reiterated by fax and by letter, in which the written contract was enclosed. The parties agreed on delivery of 400 metric tons of cocoa beans of standard grade and count for a price of USD 496,299.55. The delivery of the cocoa beans should take place during March and May 2002 and should have been announced by RESPONDENT during January or February 2002. Since Mediterraneo and Equatoriana are both parties to the United Nations Convention on Contracts for the International Sale of Goods [*hereafter: CISG*], it is applicable in this case. The contract contained an arbitration agreement in which the contracting parties have agreed upon arbitration in Vindobona, Danubia under the Rules of Arbitration of the Chamber of Commerce and Industry of Geneva, Switzerland.

2002

24 February RESPONDENT informed CLAIMANT about a storm which had hit the cocoa producing areas in Equatoriana. Furthermore, RESPONDENT informed CLAIMANT about the fact that an export embargo had been imposed by the Equatoriana Government Cocoa Marketing Organization [*hereafter: EGCMO*] at least for the month of March.

05 March CLAIMANT indicated RESPONDENT in a letter that it would need cocoa beans later that year. Moreover, it informed RESPONDENT that it would have to purchase cocoa beans elsewhere if RESPONDENT did not deliver the cocoa beans. CLAIMANT pointed out that it would make

RESPONDENT liable for any additional costs if it had to purchase elsewhere.

10 April CLAIMANT sent a fax and a letter to RESPONDENT referring to several telephone calls between the parties in which RESPONDENT did not make any explicit statements as to when it would be able to deliver the contractual amount of cocoa beans.

07 May RESPONDENT informed CLAIMANT about the delivery of 100 metric tons of cocoa beans. Furthermore, it indicated that it would "look forward" to ship the remaining 300 metric tons of cocoa beans "in the very near future".

28 May CLAIMANT received 100 metric tons of cocoa beans from RESPONDENT. CLAIMANT made payment for the 100 metric tons of cocoa beans for the amount of USD 124,075.

15 August CLAIMANT emphasized its urgent needs for the 300 metric tons of cocoa beans not yet delivered. It repeated that it would have to purchase cocoa beans elsewhere if RESPONDENT did not deliver them soon.

29 September CLAIMANT reiterated the concerns expressed in its letter of 15 August 2002.

24 October CLAIMANT purchased 300 metric tons of cocoa beans from Oceania Produce Ltd. [*hereafter: Oceania*] at the current market price of USD 2,005.26 per metric ton.

25 October CLAIMANT informed RESPONDENT of the purchase and gave notice that its counsel would bring a claim for the amount of USD 289,353 for the excess amount.

11 November CLAIMANT's counsel made a demand upon RESPONDENT for payment of USD 289,353, which amount represents the extra expenses

that it had suffered through RESPONDENT's failure to fulfill its obligations under Cocoa Contract 1045.

13 November RESPONDENT notified CLAIMANT about "rumors" that the export of additional cocoa beans would have been possible soon.

15 November CLAIMANT stressed that the cover purchase had been announced in its letter of 15 August 2002. Furthermore, CLAIMANT emphasized that Cocoa Contract 1045 had been terminated.

2003

20 November CLAIMANT and RESPONDENT concluded Sugar Contract 2212 for 2,500 metric tons of sugar for a price of USD 385,805. The contracting parties included an arbitration clause in their contract, which called for arbitration in Port Hope under the Rules of Arbitration of the Oceania Commodity Association [*hereafter: OCA Rules*].

15 December The shipment of 2,500 metric tons of sugar arrived in Mediterraneo. The sugar delivered by RESPONDENT was contaminated.

19 December CLAIMANT informed RESPONDENT about the fact that the delivered sugar had become contaminated and therefore, could not be used by CLAIMANT for its confectionary production.

In view of the above facts, we respectfully make the following submissions on behalf of our client, Mediterraneo Confectionary Associates, Inc., CLAIMANT, and request the Arbitral Tribunal to hold that:

- Mediterraneo Confectionary Associates, Inc., CLAIMANT, validly avoided Cocoa Contract 1045 of 19 November 2001 in part and can recover damages in the amount of USD 289,353 or, alternatively, in the amount of USD 172,024.

- Equatoriana Commodity Exporters, S.A., RESPONDENT, is not exempt from paying damages pursuant to Art. 79 CISG.

- The Tribunal has no jurisdiction to consider RESPONDENT's assertions concerning Sugar Contract 2212 dated 20 November 2003.

FIRST ISSUE: CLAIMANT VALIDLY AVOIDED COCOA CONTRACT 1045 IN PART AND THUS IS ENTITLED TO RECOVER DAMAGES.

1 CLAIMANT validly exercised its right to avoid Cocoa Contract 1045 in part pursuant to the CISG (**A.**). CLAIMANT therefore is entitled to recover damages pursuant to Artt. 45 (1) (b) and 73 to 76 CISG (**B.**).

A. CLAIMANT validly avoided Cocoa Contract 1045 in part.

2 CLAIMANT had the right to avoid Cocoa Contract 1045 in part pursuant to Artt. 51 (1), 45 (1) (a) and 49 (1) (a) CISG since RESPONDENT fundamentally breached this contract (**I.**). Additionally, CLAIMANT was entitled to partially avoid the contract pursuant to Artt. 51 (1), 45 (1) (a), 47 (1) and 49 (1) (b) CISG as it fixed an additional period of time within which RESPONDENT did not perform its obligation (**II.**). Alternatively, if this Tribunal finds that the contract called for delivery in instalments, CLAIMANT had the right to avoid Cocoa Contract 1045 in regard to the outstanding instalment pursuant to Art. 73 (1) CISG (**III.**). CLAIMANT properly declared partial avoidance of Cocoa Contract 1045 (**IV.**).

I. CLAIMANT had the right to partially avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1) and 49 (1) (a) CISG.

3 CLAIMANT and RESPONDENT concluded Cocoa Contract 1045 (**1.**), which RESPONDENT fundamentally breached (**2.**), thus giving rise to CLAIMANT's right to avoid.

1. CLAIMANT and RESPONDENT concluded a valid contract of sale pursuant to the CISG.

4 CLAIMANT and RESPONDENT concluded a sales contract during a telephone conversation between Mr. Smart and Mr. Sweet on 19 November 2001. The resulting contract was valid, since oral agreements are binding pursuant to Artt. 6 and 11 CISG. The CISG applies here pursuant to Art. 1 (1) (a) CISG, since CLAIMANT and RESPONDENT have their places of business in two different countries which are both parties to the CISG (*Request for Arbitration, para. 17*). This oral contract was reiterated by fax on 19 November 2001 (*CLAIMANT's Exhibit No. 1*), and by a letter on the same day (*CLAIMANT's Exhibit No. 1)*. In this contract the parties agreed to the sale of 400 metric tons of cocoa beans of standard grade and count for a price of USD 496,299.55. RESPONDENT was obligated to announce delivery during January and February 2002, and then to make delivery during the period between March and May 2002 (*CLAIMANT's Exhibit Nos. 1, 2*).

2. RESPONDENT committed a fundamental breach of Cocoa Contract 1045 pursuant to Art. 25 CISG.

5 RESPONDENT breached Cocoa Contract 1045 by its partial failure to perform (**a.**). RESPONDENT's conduct resulted in a substantial detriment to CLAIMANT, as required by Art. 25 CISG (**b.**). This substantial detriment was foreseeable pursuant to Art. 25 CISG (**c.**).

a. RESPONDENT breached Cocoa Contract 1045.

6 RESPONDENT breached Cocoa Contract 1045. Since it only delivered 100 metric tons, instead of the 400 metric tons of cocoa beans which it was contractually bound to deliver, 300 metric tons of cocoa beans were missing.

7 RESPONDENT also breached Cocoa Contract 1045 by failing to notify CLAIMANT between January and February 2002 when it would deliver the cocoa beans. RESPONDENT

neither informed CLAIMANT during the period of time fixed in the contract, nor did it notify CLAIMANT after that period had ended when it would deliver the remaining 300 metric tons of cocoa beans.

b. RESPONDENT's conduct resulted in substantial detriment to CLAIMANT as required by Art. 25 CISG.

8 RESPONDENT's conduct caused substantial detriment to CLAIMANT in the sense of Art. 25 CISG. This substantial detriment satisfies the precondition to a fundamental breach of contract under Art. 25 CISG, thus entitling CLAIMANT to avoid Cocoa Contract 1045 pursuant to Artt. 51 (1), 45 (1) and 49 (1) (a) CISG. It would be inappropriate to require CLAIMANT to remain in the contractual relationship with RESPONDENT, since RESPONDENT's behavior substantially deprived CLAIMANT of what it was entitled to expect under Cocoa Contract 1045 pursuant to Art. 25 CISG. RESPONDENT substantially neglected CLAIMANT's contractual expectations in three legally recognized ways, each of which constitutes substantial detriment: first, RESPONDENT's conduct resulted in a loss of trust on CLAIMANT's part (**i.**), second, extreme delay in delivery (**ii.**) and third, RESPONDENT placed CLAIMANT in an untenable commercial position (**iii.**).

i. RESPONDENT's conduct caused loss of trust and thereby substantial detriment to CLAIMANT.

9 RESPONDENT's conduct caused loss of trust and thereby substantial detriment to CLAIMANT. When a party loses faith and confidence in the other party's future performance, this results in substantial detriment [*Koch, p. 246*]. Commodity trade, in particular, is "possible only on the basis of far-reaching personal confidence and trust in the loyalty of others" [*Weber, p. 884*]. Since the cocoa industry is a very small and intimate community, a high level of cooperation and trust is presupposed. RESPONDENT failed to satisfy this elementary requirement. Two aspects of its conduct caused a loss of trust for CLAIMANT. First, such loss of trust results when a buyer becomes uncertain if and when the seller will fulfill his obligation to deliver [*OLG Hamburg, 28.02.1997; LG Ellwangen, 21.08.1995; Koch, p. 250*]. RESPONDENT placed CLAIMANT in a position of extreme uncertainty when it failed to notify CLAIMANT when it would deliver the remaining 300 metric tons of cocoa beans (*CLAIMANT's Exhibit Nos. 7, 8*).

10 Second, loss of trust results when one party refuses to cooperate with the other party, as RESPONDENT did here. Such conduct violates the high level of cooperation and the other party's faith. RESPONDENT repeatedly failed to reply to CLAIMANT's numerous telephone calls during March 2002 and during June and July 2002, in which CLAIMANT inquiered when RESPONDENT would fix a date for the delivery of the 300 metric tons of cocoa beans (*Request for Arbitration, paras. 7, 9)*. By its failure to answer CLAIMANT's telephone calls RESPONDENT irresponsibly violated the duty to communicate information which is a general duty under the CISG [*Schlechtriem – Herber, Art. 7, para. 38; Honnold, para. 100*]. RESPONDENT's irresponsibility and refusal to cooperate amounts to unmerchantlike conduct which in turn violates the duty of good faith and fair dealing in international trade pursuant to Art. 1.7 (1) UNIDROIT Principles of International Commercial Contracts [*hereafter: UNIDROIT Principles*]. In accordance with Art. 7 (2) CISG, Art. 1.7 (1) UNIDROIT Principles supplements the CISG since the duty of acting according to fair dealing and good faith has not been as sufficiently developed under the CISG as under the UNIDROIT Principles [*Keinath, p. 261*]. As the CISG does not, in any of its provisions, determine the standard which the parties must apply in order to act in accordance with the duty of fair dealing and good faith, this represents a gap allowing the application of Art. 1.7 (1) UNIDROIT Principles [*Brunner, Art. 7, para. 9; Staudinger – Magnus, Art. 7, para. 14; Keinath, p. 262*]. No reasonable cocoa merchant would remain silent in the face of multiple urgent requests for clarification regarding the delivery date. On the contrary, a reasonable cocoa merchant would have cooperated with CLAIMANT in seeking a solution to CLAIMANT's urgent need for cocoa beans. However, instead of making even minimal efforts to reassure CLAIMANT that the remaining 300 metric tons of cocoa beans would be delivered, RESPONDENT showed by its silence that it was indifferent to CLAIMANT's problems. This indifference led CLAIMANT to the reasonable conclusion that it could not rely on RESPONDENT to fulfill its remaining obligation to deliver the 300 metric tons of cocoa beans. As a consequence, CLAIMANT has lost its trust in RESPONDENT's future performance, and thus suffered substantial detriment

ii. Additionally, RESPONDENT's extreme delay in delivery caused substantial detriment to CLAIMANT.

11 Substantial detriment has also resulted from RESPONDENT's extreme delay in delivery. It has been clearly held that a delay of over 2 months after the agreed period of time for delivery

had ended constituted a substantial detriment pursuant to Art. 25 CISG [*Pretura di Parma-Fidenza, 24.11.1998; cf. also Trommler, p. 110*]. Here, CLAIMANT waited nearly five months after the contractual delivery period had ended (*CLAIMANT's Exhibit Nos. 2, 8)*. Thus, the period of delay here is more than twice as long as the delay that led the Italian court to find a substantial detriment.

iii. Moreover, RESPONDENT's conduct placed CLAIMANT in an untenable commercial position and therefore resulted in substantial detriment.

12 RESPONDENT's conduct caused substantial detriment by placing CLAIMANT in an untenable commercial position. CLAIMANT's commercial position was vulnerable because it could neither reasonably plan nor ensure its commercial activities. As its stocks were uncomfortably low (*CLAIMANT's Exhibit No. 7*), CLAIMANT's capacity to continue its production was endangered. Since cocoa is the essential ingredient for confectionary production, CLAIMANT would have to stop its production if it did not receive the remaining 300 metric tons of cocoa beans. A stop of production would be very costly for CLAIMANT since its fixed costs for machines and workers would continue. Additionally, a stop would damage its existing business relations, since CLAIMANT would be unable to fulfill its obligations to produce and deliver confectionary items to its customers. This would in consequence spoil CLAIMANT's good reputation and credibility. Since "detriment" in the sense of Art. 25 CISG does not require any damages or actual loss [*Bianca/Bonell – Will, Art. 25, para. 2.1.1.2; Honsell – Schnyder/Straub, Art. 25, para. 14; Lurger, p. 91; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 9; Staudinger – Magnus, Art. 25, para. 11*], Art. 25 CISG is satisfied if the buyer's commercial activities or production are endangered, or if the buyer's reputation might suffer [*Trommler, p. 69; Honsell – Karollus, Art. 25, para. 14*]. Thus, RESPONDENT's conduct amounted to a substantial detriment to CLAIMANT because it caused an untenable commercial situation for CLAIMANT which substantially reduced its expectations under Cocoa Contract 1045.

13 For these three reasons, RESPONDENT's conduct resulted in substantial detriment to CLAIMANT pursuant to Art. 25 CISG. Even if this Tribunal does not find that each detriment independently was substantial to CLAIMANT, the amount of the three together resulted in substantial detriment to CLAIMANT pursuant to Art. 25 CISG. Therefore, this

precondition to CLAIMANT's right to avoid Cocoa Contract 1045 under Art. 25 CISG has been satisfied.

c. RESPONDENT foresaw or could have foreseen that its conduct would cause a substantial detriment to CLAIMANT as required by Art. 25 CISG.

14 A reasonable person of the same kind in the same circumstances as RESPONDENT would have foreseen that its conduct would result in a substantial detriment to CLAIMANT, as required by Art. 25 CISG. Furthermore, RESPONDENT actually foresaw that its conduct would lead to a substantial detriment.

15 A reasonable person in the sense of Art. 25 CISG is to be understood as a person similar to RESPONDENT in all attributes [*Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 14*], having knowledge of the whole spectrum of facts and events at the relevant time [*Lorenz, III. B.*]. Since RESPONDENT trades with cocoa beans, the point of view of a reasonable merchant in the cocoa industry is relevant in this case. It must be clear to such a merchant that refusing to respond to numerous urgent requests must lead to a substantial detriment in the form of a loss of trust in the future performance [*A. I. 2. b.*]. This result is obvious since there is a high level of cohesion in the cocoa industry and trust is quickly destroyed if one business partner does not cooperate. Therefore, CLAIMANT's loss of trust is the logical consequence of RESPONDENT's conduct. It would also be evident to a reasonable merchant that an extreme delay in delivery of nearly five months would place the buyer in a vulnerable commercial position. Thus, a reasonable merchant would have foreseen both the loss of trust and the harm to CLAIMANT's commercial position.

16 Moreover, RESPONDENT itself did and could have foreseen the substantial detriment. CLAIMANT informed RESPONDENT numerous times about its urgent needs for delivery of cocoa beans (*CLAIMANT's Exhibit Nos. 4, 5, 7; Procedural Order No. 2, Request No. 22*). Therefore, RESPONDENT actually knew that CLAIMANT was running out of stocks. Such knowledge acquired by the party in breach subsequent to concluding the contract must be taken into consideration [*Honsell – Karollus, Art. 25, para. 24; Schlechtriem/Schwenzer – Schlechtriem, Art. 25, para. 26*]. Thus, RESPONDENT not only could have known, but actually knew that CLAIMANT was in an untenable commercial position. As a consequence, RESPONDENT has and could have foreseen the substantial detriment that resulted from its conduct.

II. Additionally, CLAIMANT was entitled to avoid Cocoa Contract 1045 partially, since RESPONDENT failed to deliver after CLAIMANT had fixed an additional period of time pursuant to Artt. 51 (1), 45 (1) (a), 49 (1) (b) and 47 (1) CISG.

17 CLAIMANT had the right to avoid Cocoa Contract 1045 partially pursuant to Artt. 51 (1), 45 (1) (a), 49 (1) (b) and 47 (1) CISG. CLAIMANT fixed an additional period of time of reasonable length within which RESPONDENT failed to deliver (**1.**). RESPONDENT may not rely on the fact that no specific date was mentioned in the letter fixing the additional period of time (**2.**).

1. CLAIMANT fixed an additional period of time of reasonable length during which RESPONDENT failed to deliver.

18 CLAIMANT fixed an additional period of time in complete accordance with Art. 47 (1) CISG by its letter of 15 August 2002 from Mr. Sweet to Mr. Smart (*CLAIMANT's Exhibit No. 7*). In this letter, CLAIMANT asked RESPONDENT to deliver the remaining 300 metric tons of cocoa soon. Thereby, CLAIMANT gave RESPONDENT another opportunity to deliver the remaining 300 metric tons of cocoa beans. In general, an additional period of time of seven weeks has been deemed reasonable [*OLG Celle, 24.05.1995; Staudinger – Magnus, Art. 47, para. 19*]. In this case, CLAIMANT granted RESPONDENT an additional period of nearly two and a half months, which is nearly as long as the original contractual delivery period of three months. Only then did CLAIMANT proceed to make a cover purchase and declare Cocoa Contract 1045 avoided. Since the buyer's interests prevail [*Honsell – Schnyder/Straub, Art. 47, para. 23; Staudinger – Magnus, Art. 47, para. 19*], focus is to be put on CLAIMANT's desperate needs for cocoa beans. Although CLAIMANT granted RESPONDENT this additional time to perform after 15 August 2002, RESPONDENT failed to deliver or at least to give notice about when it could ship the outstanding cocoa beans.

19 The additional time frame given by CLAIMANT had elapsed by 25 October 2002, when CLAIMANT declared avoidance. RESPONDENT itself should have known that an additional period of over two months after 15 August 2002 was more than enough time for it to make delivery of cocoa beans, particularly since CLAIMANT had informed RESPONDENT several times about its urgent needs for the remaining cocoa beans (*CLAIMANT's Exhibit Nos. 4, 5 ,7; Procedural Order No. 2, Request No. 22*).

20 Even if RESPONDENT itself might not have considered the length of the additional period of time as appropriate, a reasonable merchant in RESPONDENT's circumstances would have

under Art. 8 (2) CISG. Such a merchant would not have expected CLAIMANT to wait almost five months after the end of the contractual delivery period. Such a person would have borne in mind that CLAIMANT had already expressed its growing needs for cocoa beans in its letter of 5 March 2002 (*CLAIMANT's Exhibit No. 4*) and that CLAIMANT set an additional period of time which was more than two month long in its letter of 15 August 2002. The additional period of time, in order to be reasonable, need not equal the original delivery period, neither in length nor in other modalities [*Schlechtriem/Schwenzer – Müller-Chen, Art. 47, para. 6*]. In this case, it was nearly as long as the contractual delivery period. Therefore, CLAIMANT granted RESPONDENT more than enough time to arrange the delivery of the remaining 300 metric tons of cocoa beans. However, RESPONDENT did not do anything but refer to the export embargo (*Procedural Order No. 2, Request No. 22*) while CLAIMANT was running out of stocks.

21 In conclusion, CLAIMANT made its cover purchase in the very last moment feasible as its stocks were already dangerously low (*CLAIMANT's Exhibit No. 8*). RESPONDENT could have been aware of the reasonable time frame it was granted with to finally perform. As a result CLAIMANT's conduct was consistent with Art. 47 (1) CISG.

2. RESPONDENT may not rely on the fact that no specific date was mentioned in the letter fixing the additional period of time.

22 RESPONDENT may not rely on the fact that no specific date was mentioned in the letter fixing the additional period of time. CLAIMANT fixed an additional period of time pursuant to Art. 47 (1) CISG in accordance with an established practice between the parties (**a.**). In any event, RESPONDENT may not insist on a specific date to "fix an additional period of time" under Art. 47 (1) CISG as this requirement should be interpreted liberally in this case in order to promote good faith in international trade pursuant to Art. 7 (1) CISG (**b.**).

a. CLAIMANT fixed an additional period of time pursuant to Art. 47 (1) CISG in accordance with a practice established between the parties.

23 CLAIMANT unequivocally set an additional period of time for RESPONDENT. In this case, the expression "soon" is sufficient as an additional period of period of time under Art. 47 (1) CISG. CLAIMANT relied upon the well-established practice between the parties of using unspecific terms in their communications, in accordance with Art. 9 (1) CISG. The parties are

bound to observe these practices [*Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 9, para. 6*]. CLAIMANT and RESPONDENT, who have done business together several times in the past (*CLAIMANT's Exhibit No. 8; Procedural Order No. 2, Request No. 16*), have always used unspecific terms in their correspondence. Instead of exact dates the parties have chosen expressions such as "at least the month of March" (*CLAIMANT's Exhibit No. 3*), "in the very near future" (*CLAIMANT's Exhibit No. 6*), and "later this year" (*CLAIMANT's Exhibit No. 4*). Another example of such a practice can be found in Cocoa Contract 1045 itself, where the parties agreed upon various periods of time – January to February and March to May – rather than on any precise date for notification or delivery (*CLAIMANT's Exhibit No. 2*). For this reason, the use of unspecific terms is a practice established between the contracting parties pursuant to Art. 9 (1) CISG. Consequently, CLAIMANT's conduct was in conformity with the practice established between it and RESPONDENT to fix the further time frame for RESPONDENT's performance.

b. To promote good faith according to Art. 7 (1) CISG this Tribunal should not require a specific date to "fix an additional period of time" under Art. 47 (1) CISG in this case.

24 RESPONDENT cannot insist on a specific date to "fix an additional period of time" under Art. 47 (1) CISG. This Tribunal should interpret this requirement under Art. 47 (1) CISG liberally and in regard to its legal history, in order to promote good faith in international trade pursuant to Art. 7 (1) CISG. In such a case as this one, it would be inappropriate to require CLAIMANT to fix a precise date for RESPONDENT's delivery. The aim of Art. 47 (1) CISG is to provide a reasonable balance between the seller and the buyer. It initially protects the seller, by encouraging the buyer to give seller an opportunity to fulfill its obligations within an additional period of time. But ultimately, Art. 47 (1) CISG protects the buyer by giving it the right to avoid the contract when the seller fails to perform within the additional period of time [*Honnold – Secretariat Commentary, Art. 43, para. 6; Achilles, Art. 47, para. 1*].

25 RESPONDENT could not reasonably expect to keep CLAIMANT waiting indefinitely for delivery of the remaining 300 metric tons of cocoa beans, especially since RESPONDENT had kept idle despite CLAIMANT's persistent inquiries. RESPONDENT made no proposals for delivery, nor did it give CLAIMANT any indication that it was trying to use the additional period of time to arrange for delivery (*Procedural Order No. 2, Request No. 22*).

26 Furthermore, it is a usage in the whole cocoa industry to fix unspecific delivery periods. Just as in this case cocoa beans are mostly delivered by ship. As ships can be slower or faster depending on the weather conditions delivery periods tend to vary in length. Thus, it would not have made any sense to fix a specific day as to when the delivery was due. As a conclusion, CLAIMANT sufficiently fixed the additional period of time as required by Art. 47 (1) CISG.

27 Therefore, RESPONDENT cannot insist on a strict date since CLAIMANT has waited for almost five months for performance in vain. Consequently, if this Tribunal upholds a strict reading of Art. 47 (1) CISG, it would result in injustice in this case as the party who has failed to act as a reasonable merchant would be rewarded. This would undermine good faith and fair dealing in international trade.

III. Alternatively, if the Tribunal considers that Cocoa Contract 1045 called for delivery in instalments, CLAIMANT had the right to avoid the contract in regard to the outstanding instalment pursuant to Art. 73 (1) CISG.

28 If this Tribunal finds that Cocoa Contract 1045 called for delivery in instalments, CLAIMANT validly avoided this contract in regard to the outstanding instalment pursuant to Art. 73 (1) CISG. RESPONDENT fundamentally breached Cocoa Contract 1045 by non-notification and non-delivery of the shipping date (**1.**). Alternatively, RESPONDENT fundamentally breached Cocoa Contract 1045 by failing to deliver the outstanding instalment in the additional period of time fixed by CLAIMANT (**2.**).

1. RESPONDENT committed a fundamental breach pursuant to Art. 25 CISG in regard to the outstanding instalment by non-notification of the shipping date and non-delivery.

29 CLAIMANT validly avoided Cocoa Contract 1045 in regard to the outstanding instalment pursuant to Art. 73 (1) CISG. This provision is applicable since Cocoa Contract 1045 also permitted delivery in several instalments (*CLAIMANT's Exhibit No. 2*). The prerequisites of this provision are satisfied since the requirements for avoidance are the same as under Art. 47 CISG. For the same reasons as laid out above [*A. I. 2.*], RESPONDENT committed a fundamental breach in regard to the outstanding instalment pursuant to Art. 25 CISG and

therefore CLAIMANT was entitled to avoid the contract with respect to that instalment according to Art. 73 (1) CISG.

2. Alternatively, RESPONDENT committed a fundamental breach of contract pursuant to Art. 25 CISG by not delivering the outstanding instalment in the additional period of time fixed by CLAIMANT.

30 Even if this Tribunal does not view RESPONDENT's non-performance and non-notification of the shipping date as a fundamental breach of contract, the prerequisites of Art. 73 (1) CISG are nevertheless satisfied. A breach of contract in regard to an instalment, which was not fundamental from the beginning, becomes fundamental if the outstanding instalment is not delivered within the additional period of time fixed by the buyer [*Staudinger – Magnus, Art. 73, para. 10; Schlechtriem – Leser, Art. 73, para. 16; Handelsgericht Kanton Zürich, 05.02.1997*]. Since RESPONDENT did not deliver the instalment within the additional period of time fixed by CLAIMANT [*A. II.*], it fundamentally breached Cocoa Contract 1045 in regard to this instalment.

IV. CLAIMANT declared avoidance pursuant to Art. 26 CISG on 25 October 2002.

31 CLAIMANT declared avoidance pursuant to Art. 26 CISG by informing RESPONDENT about the substitute transaction on 25 October 2002 (*CLAIMANT's Exhibit No. 8*), which has already been anticipated in its letter of 15 August 2002 (*CLAIMANT's Exhibit No. 7*). It is not necessary to use the term "avoidance" explicitly in the declaration of avoidance [*Schlechtriem – Leser, Art. 26, para. 10; Schlechtriem – Huber, Art. 49, para. 29; Enderlein, in: IPRax 1991, p. 315; Neumayer/Ming, Art. 26, para. 1; ICC Award No. 8128; OGH, 05.07.2001*]. Providing information about a substitute transaction is tantamount to a declaration of avoidance pursuant to Art. 26 CISG [*OLG Hamburg, 28.02.1997; OLG Bamberg, 13.01.1999; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 5*]. In the letter of 5 March 2002 from Mr. Sweet to Mr. Smart (*CLAIMANT's Exhibit No. 4*), CLAIMANT informed RESPONDENT for the first time that it would make a cover purchase unless RESPONDENT delivered in time. The information about the possible cover purchase was reiterated in the letter of 15 August 2002 from Mr. Sweet to Mr. Smart (*CLAIMANT's Exhibit No. 7*). Furthermore, in the letter of 25 October 2002, Mr. Sweet clearly gave notice that CLAIMANT had made a cover purchase and that it would hold RESPONDENT responsible

for the extra costs arising out of the substitute transaction in the amount of USD 289,353. Therefore, CLAIMANT declared avoidance of Cocoa Contract 1045 on 25 October 2002.

32 Assuming but not conceding that this Tribunal finds that CLAIMANT did not avoid Cocoa Contract 1045 on 25 October 2002, CLAIMANT declared avoidance explicitly in an abundance of caution in its letter of 15 November 2002 by stating that it considered the contract to be terminated (*CLAIMANT's Exhibit No. 11*).

B. CLAIMANT is entitled to recover damages from RESPONDENT.

33 As a consequence of RESPONDENT's breach and CLAIMANT's avoidance on 25 October 2002, CLAIMANT is entitled to recover damages in the amount of USD 289,353 (**I.**). Even if this Tribunal comes to the conclusion that the declaration of avoidance took place on 11 November 2002, CLAIMANT is entitled to recover damages in the amount of USD 172,024 pursuant to Artt. 45 (1) (b) and 76 CISG (**II.**). Furthermore, CLAIMANT acted in accordance with its duty to mitigate loss in any regard pursuant to Art. 77 CISG (**III.**).

I. CLAIMANT has the right to recover damages in the amount of USD 289,353.

34 CLAIMANT was justified in making a cover purchase on 24 October 2002 and therefore it can recover damages in the amount of USD 289,353 pursuant to Artt. 45 (1) (b) and 75 CISG (**1.**). Alternatively, CLAIMANT is entitled to recover damages in the same amount pursuant to Artt. 45 (1) (b) and 76 CISG (**2.**).

1. CLAIMANT can recover damages pursuant to Artt. 45 (1) (b) and 75 CISG.

35 CLAIMANT entered into a substitute transaction pursuant to Artt. 45 (1) (b) and 75 CISG (**a.**). Furthermore, RESPONDENT may not rely on the fact that CLAIMANT declared avoidance one day after it made the cover purchase as this was in a timely manner (**b.**). Consequently, CLAIMANT is entitled to recover damages in the amount of USD 289,353 pursuant to Art. 75 CISG (**c.**).

a. CLAIMANT's cover purchase satisfies the requirements of a substitute transaction pursuant to Artt. 45 (1) (b) and 75 CISG.

36 CLAIMANT validly entered into a substitute transaction pursuant to Artt. 45 (1) (b) and 75 CISG by purchasing 300 metric tons of cocoa beans on 24 October 2002 (*CLAIMANT's Exhibit No. 8*). Since RESPONDENT had failed to deliver the remaining 300 metric tons of cocoa beans due under Cocoa Contract 1045 [*A. I. 2.*], CLAIMANT was entitled to make a cover purchase.

37 In order to be entitled to claim damages calculated on the basis of the substitute transaction, the buyer must act reasonably, in a manner consistent with the standards applicable to a careful and prudent businessman, and must observe the relevant practice of the trade [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 7; ICC Award No. 8128*]. In this case, CLAIMANT acted reasonably by covering in October, because that is when its cocoa stocks became critically low (*CLAIMANT's Exhibit No. 7; Procedural Order No. 2, Request No. 22*). The CISG should not be read to require CLAIMANT to completely exhaust its stocks, especially in a case like this one, where the buyer ordered the necessary cocoa beans almost a full year prior to when it would actually need those raw materials (*CLAIMANT's Exhibit Nos. 1, 2*). Therefore, CLAIMANT acted as a careful and prudent businessman by giving RESPONDENT as much time as possible to fulfill its contractual obligation and by purchasing the 300 metric tons of cocoa beans on 24 October 2002.

38 Additionally, the buyer must purchase substitute goods at the lowest price possible [*Bianca/Bonell – Knapp, Art. 75, para. 2.4*; *Honsell – Schönle, Art. 75, para. 15; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 7*]. It was reasonable for CLAIMANT to purchase substitute cocoa beans at the current market price on 24 October 2002 (*CLAIMANT's Exhibit No. 8; RESPONDENT's Exhibit No. 3; Procedural Order No. 2, Request No. 25*). It is irrelevant that the price for cocoa beans was lower in November, since the reasonableness of CLAIMANT's cover transaction must be evaluated under the circumstances when it was made, and not using hindsight. The modalities at the time the cover purchase was made are decisive [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 6; Honsell – Schönle, Art. 75, para. 17*]. CLAIMANT could not have known that the price would be lower in November 2002. In fact, the cocoa prices have been rising constantly for more than a year, and in previous years, November prices have never been significantly lower than the October prices. (*RESPONDENT's Exhibit No. 3)*. Moreover, CLAIMANT acted reasonably by covering in October, since that is when its critical need arose (*Procedural Order No. 2, Request No. 24*). Indeed, if CLAIMANT had waited any longer to cover, it

would have incurred damages resulting from shutting down its production, which might later be deemed a failure to mitigate. CLAIMANT's conduct shows the importance of assuring its supply of raw materials well in advance, in order to keep its production running.

39 Therefore, CLAIMANT acted as a careful and prudent businessman by purchasing at a reasonable time and at the lowest price possible. As a result, the requirements of Art. 75 CISG are satisfied and CLAIMANT reasonably purchased the 300 metric tons of cocoa beans on 25 October 2002.

b. RESPONDENT may not rely on the fact that CLAIMANT declared avoidance one day after it made the cover purchase as this was in a timely manner.

40 The fact that CLAIMANT made the cover purchase one day before the declaration of avoidance (*CLAIMANT's Exhibit No. 8*) does not invalidate the cover transaction pursuant to Art. 75 CISG. CLAIMANT's declaration of avoidance was timely, since it protected RESPONDENT from harm and thus fulfilled the aim of Art. 75 CISG. The purpose of making a declaration of avoidance prior to the substitute transaction is to clarify that the contract will not be performed and thereby to protect the party in breach from making any dispositions regarding the apparently valid contract [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 75, para. 5*]. RESPONDENT took no steps to ship the 300 metric tons of cocoa beans on 24 October 2002, when CLAIMANT entered into a substitute transaction. Thus, RESPONDENT did not make any dispositions in regard to the outstanding 300 metric tons of cocoa beans before CLAIMANT declared avoidance of Cocoa Contract 1045 on 25 October 2002.

41 Making the declaration of avoidance on 25 October 2002 resulted in no harm to RESPONDENT, since RESPONDENT could not have fulfilled its contractual obligations to CLAIMANT in the time between 24 and 25 October 2002. The procedure for releasing cocoa beans from the warehouse for shipment would have taken longer than one day, and RESPONDENT was contractually obliged to notify CLAIMANT of the shipping date prior the making any dispositions. RESPONDENT informed CLAIMANT 11 days in advance before delivering the first 100 metric tons of cocoa beans, since it gave notice on 7 May 2002 that loading would take place on or about 18 May 2002 (*CLAIMANT's Exhibit No. 6*). Therefore, CLAIMANT could safely assume that it would receive notice from RESPONDENT at least one day before the remaining 300 metric tons of cocoa beans were to

be loaded. Thus, CLAIMANT's declaration of avoidance was timely, since CLAIMANT knew that RESPONDENT was not in a position to perform at that time.

42 If this Tribunal were to reach an opposite conclusion, it would be insisting on a formality which would have had no impact on the delivery. Such an unduly strict interpretation of the requirements of Art. 75 CISG in this case would undermine the rationale of Art. 75 CISG.

43 Consequently, CLAIMANT validly entered into a substitute transaction pursuant to Art. 75 CISG and properly declared avoidance in a timely manner.

2. If this Tribunal finds that Art. 75 CISG is not applicable, CLAIMANT is entitled to recover damages pursuant to Artt. 45 (1) (b) and 76 CISG.

44 If this Tribunal does not accept the argument that CLAIMANT entered into a valid substitute transaction, CLAIMANT may still recover damages in the same amount, USD 289,353, pursuant to Artt. 45 (1) (b) and 76 CISG. CLAIMANT rightfully avoided Cocoa Contract 1045 on 25 October 2002 (*CLAIMANT's Exhibit No. 8)*. There was, at that time, a current market price for cocoa beans, as required by Art. 76 CISG. Hence, CLAIMANT acted in accordance with Art. 76 CISG by purchasing cocoa beans at that price. As of 25 October 2002, the current market price for cocoa beans of the same grade as the one agreed to by the parties was 100.03 US cents/pound (*RESPONDENT's Exhibit No. 3)*, which equals USD 2,205.26 per metric ton. The contract price fixed by RESPONDENT and CLAIMANT was USD 1,240.75 per metric ton. The difference between these prices is USD 964.51 per metric ton of cocoa. CLAIMANT had to purchase 300 metric tons of cocoa. Thus, CLAIMANT is entitled to recover damages pursuant to Art. 76 CISG in the amount of USD 289,353, which amount equals the difference between the price fixed by the parties in the contract and the current market price at the time of avoidance.

II. Alternatively, if this Tribunal finds that CLAIMANT declared avoidance on 11 November 2002, CLAIMANT is entitled to recover damages in the amount of USD 172,024 pursuant to Art. 76 CISG.

45 If this Tribunal were to conclude that CLAIMANT's declaration of avoidance of Cocoa Contract 1045 on 25 October 2002 was not effective, it should also conclude that CLAIMANT effectively declared avoidance on 11 November 2002. On that date, CLAIMANT's advocate clearly stated, in an abundance of caution, that CLAIMANT

considered Cocoa Contract 1045 to be terminated (*CLAIMANT's Exhibit No. 11*). Therefore, CLAIMANT is entitled to recover damages in the amount of USD 172,026, which amount equals the difference between the contract price for 300 metric tons of cocoa (i.e., USD 372, 225) and what the price of substitute goods purchased in November would have been (i.e., USD 544,251).

III. CLAIMANT acted in accordance with its duty to mitigate loss pursuant to Art. 77 CISG.

46 CLAIMANT acted in accordance with its duty to mitigate loss resulting from RESPONDENT's breaches. This duty arises whenever it is clear that the other party will commit a breach of contract [*Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 02.02.2000; Honnold – Secretariat Commentary, Art. 73, No. 4; Herber/Czerwenka, Art. 77, para. 7; Neumayer/Ming, Art. 77, para. 1; Schlechtriem/Schwenzer – Stoll, Art. 77, para. 6.*]. CLAIMANT gave RESPONDENT as much time as possible to fulfill its obligation to deliver the 300 metric tons of cocoa beans not yet delivered (*CLAIMANT's Exhibit No. 7; Procedural Order No. 2, Request No. 22*). Once it became clear that RESPONDENT would not deliver and CLAIMANT could wait no longer, CLAIMANT purchased the cocoa beans elsewhere [*B. I. 1.*]. Since the standard which must be met by the reasonableness of the substitute transaction is the same as the one which must be met by the duty to mitigate loss according Art. 77 CISG [*Witz/Salger/Lorenz – Witz, Art. 75, para. 7*], CLAIMANT has acted in accordance with Art. 77 CISG by fulfilling the requirements of Art. 75 CISG [*B. I. 1.*].

47 If this Tribunal finds that Art. 76 CISG instead of Art. 75 CISG is applicable to measure damages, CLAIMANT still purchased at the right market price. The duty to mitigate loss does not require the buyer to make a cover purchase at a lower price than the market price [*Schlechtriem/Schwenzer – Stoll, Art. 77, para. 11*]. Even if this is included in the duty to mitigate loss, CLAIMANT nevertheless acted in accordance with Art. 77 CISG because it had no possibility to purchase the cocoa beans at a lower price than the market price in October [*B. I. 1.*].

SECOND ISSUE: RESPONDENT IS NOT EXEMPT FROM PAYING DAMAGES PURSUANT TO ART. 79 CISG.

48 Art. 79 CISG imposes an exceptionally high burden on the party seeking exemption. In this case RESPONDENT cannot sufficiently prove that the requirements of Art. 79 CISG were met and that it therefore is exempt from paying damages. Rather RESPONDENT is fully liable for its failure to perform its delivery obligation. The storm and the subsequent export embargo imposed by the EGCMO did not constitute an impediment hindering RESPONDENT's performance, since RESPONDENT's delivery obligation was not limited to cocoa beans from Equatoriana (**A.**). Even if only cocoa beans from Equatoriana were the subject of this contract, RESPONDENT is not exempt from paying damages because it could have overcome the purported impediment (**B.**)

A. Neither the storm nor the export embargo imposed by the EGCMO constituted an impediment hindering RESPONDENT's performance, since RESPONDENT's delivery obligation was not restricted to Equatoriana cocoa beans.

49 Since Cocoa Contract 1045 did not expressly call for the delivery of cocoa beans only from Equatoriana, RESPONDENT could have fulfilled its obligation to CLAIMANT by delivering cocoa beans from any country in Group C. Therefore, neither the storm nor the export embargo hindered RESPONDENT's performance of its delivery obligation. An interpretation of Cocoa Contract 1045 according to Art. 8 (2) CISG (**I.**) and Art. 8 (1) CISG (**II.**) shows that there is no implicit agreement between the parties to restrict RESPONDENT's delivery obligation to cocoa beans only from Equatoriana. Furthermore, no practice pursuant to Artt. 8 (3), 9 (1) CISG which could restrict RESPONDENT's delivery obligation to cocoa beans from Equatoriana has been established between the parties (**III.**).

I. The interpretation of Cocoa Contract 1045 pursuant to Art. 8 (2) CISG shows that RESPONDENT's obligation to deliver was not restricted to cocoa beans from Equatoriana.

50 Cocoa Contract 1045 was for generic goods on a ready market, and not for goods for which there was no ready market. Therefore, RESPONDENT bears the risk of procuring the goods [*Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 18*]. The interpretation of Cocoa Contract 1045 from a reasonable merchant's point of view according to Art. 8 (2) CISG leads

to the conclusion that RESPONDENT's delivery obligation was not restricted to cocoa beans from Equatoriana. Cocoa Contract 1045 did not contain any term which defined Equatoriana as the country of origin. It designated only cocoa beans of "standard grade and count" (*CLAIMANT's Exhibit No. 1*). RESPONDENT and CLAIMANT did not agree that the cocoa beans must be from Equatoriana. No reasonable merchant would have understood the designation "standard grade and count" as pertaining to, much less restricting the origin of the cocoa beans. As explained in the New York Board of Trade Cocoa Rules 9.18 [*hereafter: NYBOT Rules*], this term is only used to describe the quantity and quality of the cocoa beans and does not concern the country of origin.

51 Similarly, no reasonable merchant would have understood the contractual reference in the price term to "Group C in the NYBOT Rules" (*Answer to Notice of Arbitration and Counter-Claim, para. 8*) as restricting the origin of the cocoa beans to Equatoriana. Since Equatoriana is just one among a number of other countries included in Group C, Cocoa Contract 1045 did not call for cocoa beans only from Equatoriana. In particular, cocoa beans from Bolivia, Haiti, Indonesia – Sulawesi, Malaysia, Para (Brazil), Peru, Sanchez (Dominican Republic), as well as all other sources not specified in Group A and B also belong to Group C (*RESPONDENT's Exhibit No. 1*). Therefore, a reasonable merchant would have expected that RESPONDENT's delivery obligation comprises cocoa beans from any country, and not only from Equatoriana. None of the other countries of Group C were affected by the storm (*Procedural Order No. 2, Request No. 9*).

52 A reasonable person would have considered the knowledge of previous dealings and negotiations between the parties and would have been aware of world markets and events [*Bianca/Bonell – Farnsworth, Art. 8, No. 2.4; Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8, para. 20*]. Therefore, a reasonable merchant of the same kind as CLAIMANT would have taken into account that neither in Mediterraneo nor in Equatoriana did any regulation exist (*Procedural Order No. 2, Request No. 20*) which would have required delivery of cocoa beans only from Equatoriana. Futhermore, it would also have paid attention to the fact that RESPONDENT is an exporter and not a producer of cocoa beans. A reasonable merchant might possibly have assumed a restriction to cocoa beans from Equatoriana, if RESPONDENT would have been an Equatoriana producer, but that is not the case here. RESPONDENT, as a trader, was in a position to deliver cocoa beans from different countries, especially since RESPONDENT also trades commodities produced in other countries (*Procedural Order No. 2, Request No. 14*). Finally, RESPONDENT has asserted that its company name, Equatoriana Commodity Exporters, S.A., indicates a restriction of its delivery

obligation to commodities from Equatoriana (*Answer to the Notice of Arbitration para. 4*). A reasonable person would have understood RESPONDENT's name solely as providing information about its place of business, and would understand "Commodity Exporters" as referring to a trading company. The fact, asserted by RESPONDENT, that only a "small portion of its business involves the sale of commodities produced in other countries" is not relevant to the question whether a reasonably merchant would have assumed, based on Cocoa Contract 1045 and the seller's name, that the contract was limited only to cocoa beans from Equitoriana. Interpreting Cocoa Contract 1045 according to Art. 8 (2) CISG leads to the result that RESPONDENT's delivery obligation is not restricted to Equatoriana cocoa beans.

II. RESPONDENT may not rely on its alleged intention to restrict its delivery obligation only to Equatorian cocoa beans pursuant to Art. 8 (1) CISG, since CLAIMANT could not have been aware of RESPONDENT's alleged intention.

53 Even if RESPONDENT had intended to limit its delivery obligation to cocoa beans only from Equatoriana, this intention would not have been binding upon CLAIMANT, because CLAIMANT was not and could not have been aware of any such intention. Since RESPONDENT never stated explicitly its intention during the contract negotiations, CLAIMANT could have only inferred RESPONDENT's intention from a term of Cocoa Contract 1045. However, Cocoa Contract 1045 did not contain any term which called for cocoa beans only from Equatoriana according to the understanding of a reasonable person in sense of Art. 8 (2) CISG [*A. I.*]. Therefore, CLAIMANT could not have been aware of RESPONDENT's alleged intention.

54 Furthermore, CLAIMANT could not have inferred RESPONDENT's intention out of the wording of previous contracts between the two parties, since Cocoa Contract 1045 like all previous contracts was written on a standard form (*Procedural Order No. 2, Request No. 15*). The standard form of Cocoa Contract 1045 does not contain any explicit term designating a specific source for cocoa beans. Therefore, CLAIMANT could not have deduced any restriction of RESPONDENT's delivery obligation to Equatoriana cocoa beans from previous contracts.

55 The fact that CLAIMANT was unaware of RESPONDENT's alleged intention is underlined by CLAIMANT's statement in its letter of 5 March 2002, where it stated unambiguously that the origin of the cocoa beans was "completely irrelevant" to it (*CLAIMANT's Exhibit No. 4*). Even if this statement was made subsequent to the conclusion of Cocoa Contract 1045, it has

to be taken into consideration when determining CLAIMANT's original intention according to Art. 8 (3) CISG, since a subsequent statement allows to draw the conclusion that the intention reflected thereby already existed at the time of conclusion [*Schlechtriem/Schwenzer – Schmidt-Kessel, Art. 8, para. 50; BGH, 16.10.1997*]. Consequently, CLAIMANT's statement on 5 March 2002 reflected its current and original intention not to restrict RESPONDENT's delivery obligation to cocoa beans only from Equatoriana. This shows that CLAIMANT was not and could not have been aware of any different intention of RESPONDENT.

III. No practice restricting RESPONDENT's delivery obligation has been established between the parties according to Artt. 8 (3) and 9 (1) CISG.

56 The fact that RESPONDENT has delivered Equatoriana cocoa beans to CLAIMANT in previous transactions does not establish a practice limiting RESPONDENT's delivery obligation solely to Equatoriana cocoa beans pursuant to Artt. 8 (3) and 9 (1) CISG. While practices established between the parties may supplement their contract [*Schlechtriem – Junge, Art. 9, para. 7*], they may not change the main contractual obligation agreed upon by the parties. The types of practices that may be relevant under the CISG are those affecting minor contractual points, such as where the parties depart from technical requirements, e.g. modalities of delivery or payment [*Bianca/Bonell – Bonell, Art. 9, para. 2.1.1.*]. However, a fundamental change in the scope of RESPONDENT's obligations cannot be implied from the mere fact that RESPONDENT chose to fulfill its obligations under prior contracts by delivering cocoa beans from Equatoriana. All prior contracts between CLAIMANT and RESPONDENT called for delivery of cocoa beans from a Group C country, and did not explicitly limit the country of origin to Equatoriana. Since RESPONDENT's performance under those contracts was consistent with its express contractual obligation, that conduct cannot also be seen as a pratice that alters the parties' basic agreement. In the current case a practice restricting RESPONDENT's delivery obligation to cocoa beans from Equatoriana would not merely supplement, but would actually alter the contractually defined obligation to deliver any cocoa beans from Group C [*A. I.*]. However, a modification of the contract requires an agreement by both parties according to Art. 29 (1) CISG. CLAIMANT and RESPONDENT did not conclude such an agreement, neither explicitly nor impliedly. Especially the delivery of Equatoriana cocoa beans by RESPONDENT and the acceptance of these beans by CLAIMANT does not constitute such an agreement restricting the broad

generic obligation initially undertaken by RESPONDENT. This conduct merely constitutes the performance of the parties' respective obligations. Therefore, no practice limiting RESPONDENT's delivery obligation has been established.

B. Even if Cocoa Contract 1045 covered only cocoa beans from Equatoriana, Art. 79 CISG does not exempt RESPONDENT from its obligation to deliver since it did not try to overcome the purported impediment.

57 RESPONDENT is not exempt from paying damages because it could have been expected to overcome the purported impediment. Since a seller is required to make every reasonable effort to be able to perform its contractual obligations [*Honnold – 1st Committee Deliberations, Art. 65, paras. 25, 32; Honsell – Magnus, Art. 79, para. 16; Brunner, Art. 79, para. 34; Staudinger – Magnus, Art. 79, para. 34; Herber/Czerwenka, Art. 79, para. 12*], RESPONDENT should have taken all necessary steps to prevent negative consequences of the export embargo.

58 A reasonable possibility to overcome the purported impediment would have been a request by RESPONDENT for an exemption from the export embargo. Many other exporters from Equatoriana asked the EGCMO for such an exemption (*Procedural Order No. 2, Request No. 12*). RESPONDENT, too, could have requested such an exemption if it were serious about finding a way to overcome the purported impediment. Even though the EGCMO rejected the requests made by the other exporters, the fact that many other exporters attempted to overcome the export embargo by asking for an exemption shows what conduct should be expected of a reasonable merchant in this situation. Therefore, RESPONDENT was also obliged to exhaust this reasonable possibility to perform its contractual obligation. However, instead of asking, RESPONDENT remained inactive. Therefore, it did not make every reasonable effort regarding the overcoming of the export embargo and cannot rely on Art. 79 CISG.

59 Another possibility for RESPONDENT to overcome the consequences of the export embargo would have been the delivery of substitute cocoa beans from a country other than Equatoriana. If the delivery of such a substitute is made in a commercially reasonable way it is a commonly accepted means to perform contractual duties in cases, where the delivery of the agreed goods is impossible [*Staudinger – Magnus, Art. 79, para. 22; Schlechtriem/Schwenzer – Stoll/Gruber, Art. 79, para. 23; Honsell – Magnus, Art. 79, para. 16; Achilles, Art. 79, para. 8; OLG Hamburg, 28. 02. 1997*]. Since RESPONDENT trades

commodities from several countries (*Procedural Order No. 2, Request No. 14*), it was in a favorable position to deliver substitute cocoa beans. This is underlined by the fact that no other countries, from which RESPONDENT could deliver, were hit by the storm on 14 February 2002 (*Procedural Order No. 2, Request Nos. 8, 9*). Furthermore, it was possible for RESPONDENT to deliver substitute cocoa beans because there is a global overproduction of cocoa beans [*Chocosuisse, p. 24*].

60 Consequently, RESPONDENT did not take all necessary steps to preclude the consequences of the export embargo and could have overcome the purported impediment by either seeking an exemption or by delivering a commercially reasonable substitute.

THIRD ISSUE: THE TRIBUNAL HAS NO JURISDICTION TO CONSIDER RESPONDENT'S ASSERTIONS CONCERNING SUGAR CONTRACT 2212.

61 This Tribunal has no jurisdiction to hear RESPONDENT's assertions concerning Sugar Contract 2212 because these claims are not covered by the arbitration clause contained in Cocoa Contract 1045, upon which the present arbitration is based (**A.**). Art. 21 (5) Swiss Rules does not compel a different result because it is inapplicable in this case (**B.**). However, if this Tribunal finds that Art. 21 (5) Swiss Rules applies, any recovery by RESPONDENT must be limited to a set-off against the amount of CLAIMANT's recoverable damages (**C.**).

A. This Tribunal has no jurisdiction to consider RESPONDENT's assertions concerning Sugar Contract 2212 because this dispute is not covered by the arbitration agreement contained in Cocoa Contract 1045.

62 This Tribunal has no jurisdiction to consider the issues raised by RESPONDENT as counter-claim pertaining to the price of 2500 metric tons of sugar delivered from RESPONDENT to CLAIMANT, since these issues fall outside the scope of the parties' arbitration agreement. An arbitral tribunal may only decide disputes which are covered by the parties' arbitration agreement. The jurisdiction of this Tribunal is based on the arbitration agreement contained in Cocoa Contract 1045. The wording of the arbitration clause in that contract does not cover RESPONDENT's asserted claim arising under Sugar Contract 2212 (**I.**). This Tribunal should uphold party autonomy and refrain from extending the scope of the arbitration agreement in

Cocoa Contract 1045 beyond the wording of the arbitration clause in Cocoa Contract 1045 (**II.**).

I. RESPONDENT's asserted claims do not fall within the wording of the arbitration clause contained in Cocoa Contract 1045.

63 The claims asserted by RESPONDENT under Sugar Contract 2212 can only be heard if they fall under the jurisdiction of the tribunal which also has jurisdiction over the main claim. This is only the case if they are covered by the arbitration agreement that establishes jurisdiction over the main claim. Thus, this Tribunal only has jurisdiction over these claims if they are covered by the arbitration clause in Cocoa Contract 1045. This requirement applies, whether the claims are characterized as counter-claims or set-off defences [*Doc. A/CN.9/264, Art. 23 (5), (8); Berger in: RIW 1998, p. 429; Iran-US Claims, 1986; Baker/Davis, p.89; Berger in RWS, p. 242; Zöller – Geimer, §1025, para. 34*].

64 In this case, RESPONDENT's asserted claims are not covered by the wording of the arbitration clause in Cocoa Contract 1045. The arbitration clause there submits any dispute "arising with respect to or in connection with" Cocoa Contract 1045 to this Tribunal (*CLAIMANT's Exhibit No. 2*). RESPONDENT's counter-claim however, concerns the delivery of 2500 metric tons of sugar from RESPONDENT to CLAIMANT in December 2003 (*Answer to Notice of Arbitration and Counter-Claim, para. 13*). The only connection between that dispute and Cocoa Contract 1045 is the identity of the parties. Identity of the parties, however, is not sufficient to show that the claim concerning Sugar Contract 2212 arises with repect to or in connection with Cocoa Contract 1045. This would only be the case if the sugar dispute had a significant relationship to Cocoa Contract 1045 [*Redfern/Hunter, 3-40*], which it does not. There are no other connections whatsoever. RESPONDENT's asserted claims thus do not fall within the scope of the arbitration clause.

II. This Tribunal should not extend the scope of the arbitration agreement in Cocoa Contract 1045 beyond its wording.

65 This Tribunal should not extend the scope of the arbitration agreement contained in Cocoa Contract 1045 beyond its wording. An extension would violate the principle of party autonomy (**1.**). In this case it would be particularly inappropriate to extend the scope of the arbitration agreement in Cocoa Contract 1045 because the issue raised by RESPONDENT is

covered by the arbitration clause in Sugar Contract 2212 (**2.**). Furthermore, the parties' right to appoint their arbitrators would be violated by an extension of their arbitration agreement (**3.**). Considerations of procedural economy and efficiency do not compel a different result (**4.**).

1. An extension of the scope of the arbitration agreement beyond the wording of the clause would violate party autonomy.

66 By extending the scope of the parties' arbitration agreement in Cocoa Contract 1045 to RESPONDENT's asserted claims, the parties' intentions and therewith the principle of party autonomy would be violated. Due to the consensual character of the whole arbitral process, an arbitration can only be conducted within the boundaries of the parties' will [*Fouchard, para. 648; Weigand – Weigand, part 1, para. 43*]. To ignore the parties' will or to interpret it too broadly would deprive the arbitration of its legitimacy and endanger legal predictability. Since the arbitration agreement reflects the parties' intentions, every arbitrator is bound by the wording of the arbitration agreement. [*Lew, p. 53*]. An extension of the scope of the proceedings beyond the wording of the arbitration agreement would therefore violate party autonomy.

2. It would be particularly inappropriate to extend the scope of the arbitration agreement in this case, because the issues raised by RESPONDENT are expressly covered by the arbitration clause in Sugar Contract 2212.

67 It is especially important that this Tribunal refrain from extending the arbitration agreement beyond the wording of the clause contained in Cocoa Contract 1045, since doing so would violate the parties' express agreement in Sugar Contract 2212. Sugar Contract 2212 clearly submits any claim arising out of or in connection with that contract to arbitration under the Rules of the Oceania Commodity Association [*hereafter: OCA-Rules*] (*RESPONDENT's Exhibit No. 4*). Since RESPONDENT's asserted claim concern the delivery of sugar under Sugar Contract 2212, it clearly falls within the scope of that arbitration agreement.

68 Violating the arbitration agreement contained in Sugar Contract 2212 would be particularly severe in this case because of the importance the parties attached to specialized arbitration for any dispute in connection with their sugar trade. The importance of specialized arbitration arises out of the special character of commodity trade. The features arising out of commodity

trade disputes often are not comparable to the standard commercial problems that arise in international arbitration, for two reason. First, particular commodity trade associations have for many decades issued specific rules to be used in conjunction with their arbitrations, for example the rules of the Grain and Feed Trade Organization (GRFTA), of the Federation of Oils, Seeds and Fats Association Ltd. (FOSFA), and of the Refined Sugar Association (RFA). These are highly specialized rules which are tailor-made for the specific trade [*Weigand – Weigand, part I., para. 57; Bernstein – Perry, 16-038*]. Second, the special character of commodity trade requires that only experts judge on matters relating to commodity trade [*Weigand – Weigand, part. 1, para. 57*]. These experts are mostly practitioners with experience in the respective field of commodity trade. This experience is particularly important here since the dispute concerns the condition of the sugar delivered by RESPONDENT to CLAIMANT (*Procedural Order No. 2, Request No. 32*). To determine the condition of the sugar, questions concerning the storage, the loading and the shipping of the sugar would have to be dealt with. In such cases, where the dispute concerns specific aspects of a certain field of trade, rather than just general questions of law, it is important that a tribunal composed of experts decides the dispute. By choosing to arbitrate under the OCA Rules, CLAIMANT and RESPONDENT clearly intended to make sure that only experts in the field of sugar trade would consider any dispute that might arise in connection with Sugar Contract 2212. This shows the importance the parties attached to a specialized arbitration. Under such circumstances, it would be inappropriate to ignore the parties' intentions to have their dispute concerning Sugar Contract 2212 decided by a tribunal specialized in commodity trade. For these reasons, this Tribunal should not extend the scope of the arbitration agreement in Cocoa Contract 1045 in order to exercise jurisdiction over RESPONDENT's asserted claims.

3. The scope of the arbitration agreement should not be extended to include RESPONDENT's assertions, since this would violate the parties' right to appoint their arbitrators.

69 Hearing RESPONDENT's asserted claims arising under Sugar Contract 2212 would violate party autonomy by depriving the parties of the right to appoint their arbitrators. When CLAIMANT and RESPONDENT each appointed an arbitrator to this Tribunal, they chose the persons who they thought were best qualified to decide their dispute under Cocoa Contract 1045. The appointment of the arbitrators is the most important decision to be made by the

parties to an arbitration since it concerns the whole arbitral process [*"L'arbitrage vaut l'arbitre"; Berger in: International Economic Arbitration, p. 201; Redfern/Hunter, 4-12*]. In fact, the right of each party to appoint one arbitrator to a three-arbitrator tribunal is one of the main reasons why parties prefer to have their disputes decided by an arbitral tribunal instead of a national court [*Weigand – Weigand, part 1, para. 14*]. Because of this paramount importance, the parties need to know at the time when they appoint the arbitrators what the subject of the arbitration will be. If this Tribunal assumes jurisdiction over the claim arising out of Sugar Contract 2212, it will introduce a subject matter into the proceeding which the parties did not consider when they made their appointments. The fact that CLAIMANT and RESPONDENT had opted for specialized arbitration in regard to claims arising under Sugar Contract 2212 emphasizes that the parties would most probably have chosen different arbitrators for claims related to the sale of sugar. Extending this Tribunal's jurisdiction to include these claims, therefore, would deprive the parties of the opportunity to select the most appropriate arbitrators to decide each of their different claims.

4. Considerations of procedural economy and efficiency do not compel a different result.

70 Considerations of procedural economy and efficiency should not lead this Tribunal to interpret the arbitration clause in Cocoa Contract 1045 so broadly as to cover RESPONDENT's asserted claims under Sugar Contract 2212. A separate arbitration under the OCA Rules chosen by the parties in Sugar Contract 2212 would not necessarily be less efficient than allowing the issues raised by RESPONDENT to be heard by this Tribunal. Even if considering those issues in the present arbitration might increase procedural efficiency and economy, the parties' explicit intention to have disputes concerning their sugar trade decided by a tribunal under the OCA Rules must be respected.

71 In any case, it would be incorrect to assert that it is procedurally inefficient to conduct separate arbitral proceedings to hear the issues that RESPONDENT wishes to have heard as a counter-claim by this Tribunal. An arbitral tribunal specialized in commodity trade arbitration is not only capable of reaching the most proper decision, but also able to achieve this decision in the shortest period of time. Furthermore, in Sugar Contract 2212 the parties chose Port Hope in Oceania as the seat of arbitration (*RESPONDENT's Exhibit No. 4*). This is significant, since the sugar, which is the object of the dispute concerning Sugar Contract 2212, was supplied and delivered to the carrier in Port Hope. Therefore, any inquiries in

regard to the condition of the sugar prior to its loading on the cargo ship would take place there. Submitting that dispute to this Tribunal's jurisdiction would be likely to result in considerable extra expenses, since any witnesses would have to be flown to Vindobona in Danubia where the present arbitration is conducted. If the Tribunal wished to get an idea, for example, of the warehouse in which the sugar was stocked prior to being loaded on the cargo ship, the arbitrators would have to travel to Oceania. These expenses would not occur if the dispute concerning the parties' sugar trade would be decided by a tribunal in Port Hope, Oceania, as provided for in Sugar Contract 2212. Thus a single arbitration dealing with the issues concerning Cocoa Contract 1045 and Sugar Contract 2212 would not necessarily be more efficient or less expensive than two separate arbitrations.

72 Even if a single arbitration would be less costly, those considerations of procedural economy cannot be allowed to override the parties' express intentions. In this case, CLAIMANT and RESPONDENT clearly demonstrated their preference for specialized procedure over procedural economy by including the arbitration clause in Sugar Contract 2212 two years after they had concluded Cocoa Contract 1045. Thus, while the parties could easily have stated in Sugar Contract 2212 that any dispute would be subject to the same dispute resolution mechanism as in their prior Cocoa Contract 1045, they did not do so. Their conduct provides strong evidence that they were willing to bear any extra costs that might arise in connection with separate arbitration of any dispute that might arise in connection with Sugar Contract 2212, in order to gain the benefits of specialized arbitration. The main emphasis must thus be placed on a specialized arbitration procedure rather than on procedural economy [*Berger in: RIW 1998, pp. 426, 430*]. Therefore, considerations of procedural economy and efficiency should not lead this Tribunal to interpret the arbitration clause in Cocoa Contract 1045 so broadly as to cover RESPONDENT's asserted claims under Sugar Contract 2212.

B. Art. 21 (5) Swiss Rules does not compel a different result because it is inapplicable in this case.

73 Art. 21 (5) Swiss Rules allows some tribunals to consider set-off defences, even when they are not covered by the arbitration agreement of the main claim. However, that rule cannot be applied in this case. First, Art. 21 (5) Swiss Rules should not be applied automatically without the parties' approval, since this would violate party autonomy (**I.**). Second, even if this Tribunal considers it desirable to provide for automatic extension of Art. 21 (5) Swiss Rules

in normal cases, it would be inappropriate to do so in the present case, since the parties have selected a specialized arbitration for any dispute in connection with Sugar Contract 2212 (**II.**).

I. Art. 21 (5) Swiss Rules should not be applied since the parties did not agree upon its application.

74 The change of the rules applicable to this arbitration from the Geneva Rules to the Swiss Rules does not lead automatically to the applicability of Art. 21 (5) Swiss Rules. The application of this provision would substantially alter the parties' original arbitration agreement and therefore should not be imposed on unwilling parties.

75 In this case the parties never agreed upon the application of Art. 21 (5) Swiss Rules or any similar provision. In Cocoa Contract 1045 the parties agreed upon arbitration under the Geneva Rules, which do not contain a provision like Art. 21 (5) Swiss Rules. During the present arbitral proceedings CLAIMANT did not give its assent in regard to the application of Art. 21 (5) Swiss Rules either. It accepted the application of the Swiss Rules, but it explicitly objected to the application of Art. 21 (5) Swiss Rules (*Answer to the Counter-Claim, para. 4*). The fact that CLAIMANT did not object before RESPONDENT raised its counter-claim, is not to be seen as an implicit assent concerning the application of Art. 21 (5) Swiss Rules. It was sufficient that CLAIMANT objected to the application of that provision in its answer to RESPONDENT's counter-claim, since pursuant to Art. 21 (3) Swiss Rules this is the point of time by which objections in regard to the jurisdiction of the tribunal may be raised.

76 The principle of party autonomy grants the parties the greatest freedom to structure the arbitral proceedings according to their will [*Redfern/Hunter, 6-03*]. When a rule applies on which the parties did not agree, this freedom is seriously limited. Therefore, the parties' consent must be obtained whenever provisions on which the parties agreed have changed or other provisions are applied. In this case the parties gave their assent to the change of the applicable rules from the Geneva Rules to the Swiss Rules in general, but not in regard to the application of Art. 21 (5) Swiss Rules.

77 An application of Art. 21 (5) Swiss Rules without the consent of the parties would have serious impact on the foundation of the parties' agreement. The tribunal considering the main claim would have to decide every dispute between the parties brought forth by a respondent relying on Art. 21 (5) Swiss Rules. Thereby the scope of the arbitration agreement of the main claim could de facto be subsequently and unilaterally changed by respondent. Moreover, if

the disputes considered by the tribunal of the main claim in accordance with Art. 21 (5) Swiss Rules are subject to other arbitration agreements, those agreements are concerned as well.

78 Furthermore, the automatic application of Art. 21 (5) Swiss Rules would be inappropriate because it would substantially alter the consequences of the parties' original choice of the Geneva Rules. Under those rules, this Tribunal would not have had jurisdiction to hear RESPONDENT's claims arising under Sugar Contract 2212. The Geneva Rules do not contain any provision providing for admissibility of set-off defences or counter-claims. Thus, if this arbitration had taken place in accordance with the Geneva Rules, there would have been a gap which would have to be closed by applying the optional provisions of the *lex arbitri*. Since Danubia as the seat of arbitration has adopted the UNCITRAL Model Law on International Arbitration [*hereafter: UNCITRAL Model Law*] without amendments, the UNCITRAL Model Law is applicable as *lex arbitri* according to Art. 1 (1), (2). The UNCITRAL Model Law is silent on this subject. However, its drafters clearly intended to limit the admissibility of defences to those that fall under the scope of the arbitration agreement of the main claim [*Doc. A/CN.9/264, Art. 23, paras. 5, 6*]. Thus, this Tribunal would not have jurisdiction over the claims arising out of Sugar Contract 2212, if the Geneva Rules agreed by these parties were applied. Applying Art. 21 (5) Swiss Rules in this case would therefore lead to different legal conclusion that seriously departs from what the parties agreed.

79 Another reason why it would be inappropriate to apply Art. 21 (5) Swiss Rules automatically is that the parties could not have anticipated that this or a similar provision might apply. No other arbitration rules in common usage, including the Arbitration Rules of the International Chamber of Commerce and the Arbitration Rules of the London Court of International Arbitration, contained a provision anything like Art. 21 (5) of the Swiss Rules. Neither of the parties in this case could have anticipated that such a rule would come into existence and change the status quo, much less be applied to any future dispute between them. Therefore, the application of Art. 21 (5) Swiss Rules would be inappropriate.

80 For these reasons, Art. 21 (5) Swiss Rules should not be applied automatically, since it alters substantially the parties' arbitration agreement in Cocoa Contract 1045.

II. Even if this Tribunal considers it desirable to provide for automatic extension of Art. 21 (5) Swiss Rules generally, it would be inappropriate to do so in this case because the parties selected specialized arbitration for disputes in connection with Sugar Contract 2212.

81 Art. 21 (5) Swiss Rules should not be imposed upon the parties before this Tribunal, because RESPONDENT's asserted claims are covered by the arbitration agreement contained in Sugar Contract 2212 which submits them to a specialized procedure.

82 The arbitration agreement contained in Sugar Contract 2212 differs dramatically from the arbitration agreement in Cocoa Contract 1045, since the arbitration agreement in Sugar Contract 2212 submits the claims raised by RESPONDENT to a specialized tribunal. Art. 21 (5) Swiss Rules should only be applied to cases in which there are no such fundamental differences between the arbitration agreement covering the main claim and the arbitration agreement covering the dispute brought forth as a set-off [*A. I.*]. An application of Art. 21 (5) Swiss Rules in this case would force the parties to conduct their arbitration under a non-specialized tribunal. Consequently it would be inappropriate to apply Art. 21 (5) Swiss Rules to this case.

C. Even if Art. 21 (5) CISG applies, any recovery by RESPONDENT must be limited to a set-off defence against the amount of CLAIMANT's recoverable damages.

83 Even if this Tribunal decides to rule over the dispute concerning Sugar Contract 2212, any recovery by RESPONDENT must be limited to a set-off defence, in strict accordance with Art. 21 (5) Swiss Rules. RESPONDENT's recovery would have to be limited according to the wording of Art. 21 (5) Swiss Rules, which only speaks of set-off defences and not of counter-claims. An extension of the application of Art. 21 (5) Swiss Rules to counter-claims is not possible due to the fundamental differences between counter-claims and set-off defences (**I.**). Strict interpretation of Art. 21 (5) Swiss Rules is also appropriate because using it to extend this Tribunal's competence to hear counter-claims arising under a different arbitration agreement raises the risk of violating that agreement and thereby jeopardizes the enforceability of the arbitral award (**II.**).

I. Art. 21 (5) Swiss Rules should not be extended from set-off defences to counter-claims, since these are fundamentally different legal devices.

84 It is inappropriate to equate counter-claims with set-off defences, since there are significant differences between them that must be respected. Counter-claims and set-off defences are entirely different devices and thus must be strictly distinguished [*Gross, p. 3*]. Only set-off defences are covered by Art. 21 (5) Swiss Rules, with good reason. While a set-off defence is a mere defence of the respondent against the claimant's claim, a counter-claim is an independent claim with an independent procedural character [*Berger in: RIW 1998, p. 429*]. The independent procedural character of a counter-claim is shown by the fact that a set-off defence becomes invalid if the main claim fails, but a counter-claim does not [*Berger in: Arbitration International, Vol. 15, No. 1, p. 60]*. Besides the different procedural character, another fundamental difference between set-off defences and counter-claims is the consequence that follows from them. The amount of a set-off defence is limited to what the claimant can recover. In contrast, a counter-claim is not limited by the recovery under the main claim, but rather may exceed the amount stated in the original claim [*Baker/Davis, p. 89*]. In this case, for example, RESPONDENT seeks recover USD 385,805 under Sugar Contract 2212, which amount significantly exceeds the damages claimed by CLAIMANT (i.e., USD 289,353).

85 Art. 21 (5) Swiss Rules clearly reflects understanding of the differences between these two devices. The drafters of the Swiss Rules introduced Art. 21 (5) to uphold the purely defensive set-off, which can only be brought in connection with the main claim, and would lapse upon the rejection of the main claim [*Peter in: ASA, p. 9*]. In contrast, there is no need to extend the tribunal's jurisdiction in the case of an independent counter-claim, since that claim may be dealt with at another time or in another forum, without regard to the disposition of the main claim. Courts and arbitral tribunals consistently recognize the different nature of these devices. For example, the European Court of Justice stated in its judgment of 13 July 1995 that counter-claims and set-off defences have to be distinguished in spite of their common characteristics [*ECJ, 13.07.1995*]. Thus, the reason for extending a tribunal's jurisdiction over a set-off defence does not also support extending it to hear a counter-claim.

II. Art. 21 (5) Swiss Rules should not be extended to counter-claims, since doing so would endanger the enforceability of the arbitral award.

86 The drafters limited Art. 21 (5) Swiss Rules to set-off defences in order to minimize the chance of creating a conflict between different arbitration agreements [*Peter in: ASA, p. 9*]. Hearing independent counter-claims increases the risk of interfering with another arbitration agreement. Moreover, mixing claims covered by different arbitration agreements in a single award might result in enforceability problems [*Peter in: ASA, p. 9*]. For example, a valid arbitration agreement is a precondition to the enforceability of an arbitral award under Art. 5 (c) of the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards. Enforcement of such an award would be uncertain in cases like this one, where the asserted counter-claim clearly falls under a separate arbitration agreement. For this reason, extending Art. 21 (5) Swiss Rules to counter-claims could endanger the enforceability of the arbitral award.

REQUESTS FOR RELIEF

In view of the above submissions, may it please the Tribunal to declare that:

- Mediterraneo Confectionary Associates, Inc., CLAIMANT, validly avoided Cocoa Contract 1045 of 19 November 2001 in part and can recover damages in the amount of USD 289,353 or, alternatively, in the amount of USD 172,024.

- Equatoriana Commodity Exporters, S.A., RESPONDENT, is not exempt from paying damages pursuant to Art. 79 CISG.

- The Tribunal has no jurisdiction to consider RESPONDENT's assertions concerning Sugar Contract 2212 dated 20 November 2003.

For Mediterraneo Confectionary Associates, Inc.,

(signed)_____ 9 December 2004

Counsels