

Swiss Chambers' Arbitration

Case no 30000-2004

Mediterraneo Confectionary Associates Inc. versus Equatoriana Commodity Exporters SA

Procedural Order No. 2

Following the procedure agreed upon by the parties and set forth in Procedural Order No. 1, the parties have submitted a number of requests for clarifications. The responses to those requests are set forth below.

Legal Rules and Arbitration

1. Are Danubia, Equatoriana, Mediterraneo and Oceania common law or civil law countries?

Equatoriana and Oceania are civil law. Mediterraneo and Danubia are common law and English speaking.

2. What is the period of limitations (prescription) for bringing a contractual claim in the relevant legal system?

Equatoriana, Mediterraneo and Oceania are all party to the Convention on the Limitation Period in the International Sale of Goods. The Convention can be found on the UNCITRAL web site. The period of limitation in the Convention is four years.

3. Is Oceania a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Yes.

4. Do the Rules of Arbitration of the Oceania Commodity Association contain any provision on counter-claims or set-offs?

The provision is identical to Article 19(3) of the UNCITRAL Arbitration Rules.

“In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.”

5. Was the adoption of the Swiss Rules of International Arbitration and their replacement for international arbitration of the arbitration rules of the six chambers of commerce, including Geneva, publicized?

The adoption of the Swiss Rules was well publicized in interested circles and known by lawyers who engage in international commercial arbitrations. The arbitration rules of each of the six chambers of commerce, including Geneva, continue to be valid for domestic Swiss arbitrations.

6. Would there be a significant difference between arbitration in a specialized body such as the Oceania Commodity Association and a body for international commercial arbitration in general, as provided in the Swiss Rules?

Commodity exchanges and many trade associations have an associated arbitration facility for disputes arising in the particular exchange or trade. Those arbitration facilities would be subject to the same arbitration law as any other arbitration facility in the same country. They would have their own rules and arbitrators would almost always come from the members of the exchange or participants in the trade concerned. The use of the associated arbitration facility is required for exchange traded contracts under the rules of commodity exchanges such as the New York Board of Trade and LIFFE and for contracts between members of many trade associations. Specialized arbitration facilities are particularly useful when the dispute is in regard to the quality of the commodities delivered or where specialized practices in the trade are concerned. Where the dispute involves general questions of law or trade practices, specialized arbitration facilities have no particular advantage over arbitration institutions for international commercial arbitration in general. Of course, where the parties have a choice of arbitration institution, the choice is normally made in the underlying contract at the time of sale and not later when the nature of the dispute is known.

The two parties in this case do not belong to any association that would require arbitration in any particular arbitration institution. Cocoa and sugar are the only two commodities sold by Equatoriana Commodity Exporters, S.A. to Mediterraneo Confectionary Associates, Inc. and all the contracts had the same arbitration clauses as found in the two contracts in question.

Cocoa contract

7. Did the various persons involved in this case act within the scope of their authority?

Yes. It might be mentioned that the arbitral center always demands a written power of attorney of the legal representatives of the parties. Those documents were submitted but are not included in the case file.

8. Does Equatoriana often experience storms in the cocoa growing area?

Storms occur in Equatoriana, as they do in most places. The storm on 14 February 2002 was the first storm in 22 years that had caused damage to the cocoa trees. The damage in 1980 was not extensive.

9. Were cocoa growing areas in other countries affected by the storm?

No.

10. When was the export ban ordered and when did it end?

The first order was on 22 February 2002 and covered the month of March 2002. On 20 March 2002 the order was extended until further notice. The export ban was rescinded on 12 November 2002.

11. What is the authority and procedures of the Equatoriana Government Cocoa Marketing Organization?

The Organization is an official entity. It has a monopoly on the purchase of cocoa from the producers. It does not sell to buyers outside Equatoriana. There are a few local users of the cocoa beans that purchase from the Organization, but the vast majority of the cocoa is sold to exporters, such as Equatoriana Commodity Exporters. The Organization stores the cocoa in its warehouses. When an exporter enters into an export contract it places an order with the Organization for an equivalent amount. Delivery to the ultimate purchaser is made directly from the Organization's warehouse on the delivery date or during the delivery period, March to May 2002 in this case. The usual procedure was followed in respect of cocoa contract 1045 up to the export embargo.

12. Could Equatoriana Commodity Exporters, S.A. have petitioned against the export embargo or asked for an exemption from it?

There was no legal procedure available for Equatoriana Commodity Exporters, S.A. to protest the export embargo. It could always have asked for an exemption. It did not do so. Several other exporters did ask for exemptions and all were rejected.

13. How long has Equatoriana Commodity Exporters, S.A. been in business and do they have a good reputation?

It has been in business since 1961 and it has a good reputation.

14. Has Equatoriana Commodity Exporters, S.A. ever supplied anyone with cocoa beans that did not originate in Equatoriana?

No. As indicated in both the Statement of Claim and the Statement of Defense, on occasion it trades commodities produced in other countries. It could do so with cocoa beans, but it never has. The sale of cocoa beans represents about 20 per cent of its total business.

15. Was cocoa contract 1045 on a standard form of Equatoriana Commodity Exporters, S.A.?

Yes. Equatoriana Commodity Exporters, S.A. adapted the contract form from the form to be found in the New York Board of Trade Cocoa Rules 9.03.

16. To what did the words "usual terms" refer to in Claimant's Exhibit No. 1?

They referred to the contract form as used in contract 1045, which had been used in all previous cocoa contracts.

17. What do the words “at par” mean as used in the New York Board of Trade Cocoa Rules (Respondent’s Exhibit 1) in regard to Group C?

Contracts are traded on the New York Board of Trade, and on LIFFE in London, for future delivery of cocoa among members of the exchange. The contracts are absolutely standardized except for the price. The New York Cocoa Rules call for the following procedure. At specified periodical intervals the contracts that each member has purchased are set off against contracts that the member has sold. A member that has sold more contracts than he has purchased must be prepared to deliver physical cocoa to a member that has bought more contracts than he has sold. Only about two per cent of the contracts result in physical delivery of cocoa. The cocoa that is to be delivered is already in a warehouse licensed by the exchange. In fulfillment of an exchange traded contract the seller can deliver cocoa produced anywhere that he has stored in a warehouse. Nevertheless, since cocoa from places listed in Group A is of a higher quality, the buyer must pay the seller USD 160 per metric ton in addition to the price for the contract. If cocoa from a place listed in Group C is delivered, no additional payment need be made. It will be noted that Group C includes a number of named countries and “all other growths not presently specified above.” Cocoa from Equatoriana is not specified, so it would fall within Group C.

The prices for any given commodity – here cocoa – paid on the major exchanges establish the world-wide market price for that commodity. Contracts such as cocoa contract 1045 are negotiated on the basis of the prices for cocoa being paid on the exchange, though they often vary from that price for specific reasons, such as the quantity purchased. Similarly, the price in those individually negotiated contracts will reflect what is to be found in the exchange rules, namely that the cost of cocoa from places listed in Group A in the New York rules is higher than for cocoa from places in Group C.

18. What do the words “standard grade and count” mean?

Reference is made to the full text of NYBOT® Cocoa Rule 9.18 at the URL noted in Respondent’s Exhibit No. 1 for an explanation.

19. Did Mediterraneo Confectionary Associates, Inc. know that the cocoa delivered in its previous contracts with Equatoriana Commodity Exporters, S.A. came from Equatoriana?

Yes. Origin was always known since it was the buyer’s responsibility to arrange for the carriage of the goods. Moreover, the bags in which the cocoa was packed indicated their origin.

20. Did either country, Mediterraneo or Equatoriana, have any regulations that would have required that the cocoa be of Equatoriana origin?

No

21. Was anything said in the telephone call of 5 March 2002, referred to in Mr. Sweet's letter of 5 March 2002, in regard to a date by which delivery had to be made?

No, other than that Mediterraneo Confectionary Associates, Inc. expected delivery during the contractual period, which would not expire for almost three months.

22. Was there any communication between Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters Mr. Sweet's letter of 15 August 2002 and the purchase of the 300 tons of cocoa on 24 October 2002?

There was one telephone call from Mr. Smart to Mr. Sweet on 29 September 2002 in which he said that there was no indication as yet as to when the export ban would be rescinded. Mr. Sweet reiterated the concerns expressed in his letter of 15 August 2002.

23. Has there ever been a legal dispute between Mediterraneo Confectionary Associates, Inc. and Equatoriana Commodity Exporters or unilateral avoidance of the contract?

No.

24. What are the yearly requirements for cocoa of Mediterraneo Confectionary Associates, Inc.?

Its yearly requirements average 1,500 metric tons. The 400 metric tons contracted for would, therefore, equal slightly over its average requirements for three month. By the time of its purchase of 300 metric tons on 24 October 2002 it had slightly more than 100 metric tons in inventory. Around the end of November it would have had to cease producing certain of its products unless it had received additional cocoa. All that it purchases is used in its confectionary business. It never purchases cocoa for resale.

25. Could Mediterraneo Confectionary Associates, Inc. have purchased the 300 tons from a different supplier at a lower price?

There were a multitude of suppliers from whom the cocoa could have been purchased. The purchase was at the then current market price and it is doubtful that a lower price could have been found. Mediterraneo Confectionary Associates, Inc. had purchased from Oceana Produce Ltd. in the past at the market price.

The chart from the International Cocoa Organization in Respondent's Exhibit No. 3 shows the average price paid for cocoa during a given month. It does not show the daily fluctuations. For the purposes of this arbitration (Moot) the prices shown in the chart for any given month are considered to represent the market price for cocoa purchased on any given day during that month.

26. Was the cocoa purchased in the cover contract of the same grade as that from Equatoriana?

Yes

27. Did the cover purchase price include the transport costs?

In both the contract with Equatoriana Commodity Exporters, S.A. and in the cover contract the transport costs were the responsibility of the buyer. Those costs were slightly higher in the cover contract, but they were not included in the claim. The possibility of including them now is subject to Swiss Rules, Article 20.

28. How much cocoa was released to Equatoriana Commodity Exporters, S.A. by the Equatoriana Government Cocoa Marketing Organization in May?

The Organization required each exporter to submit the contracts they had entered into. The Organization then released specific amounts for each of those contracts. It released 100 metric tons for the contract with Mediterraneo Confectionary Associates, Inc.

29. Could Mediterraneo Confectionary Associates, Inc. have known about the plans of the Organization to terminate the export ban before it purchased the 300 replacement tons?

The rumors that it would do so were circulating in interested circles in Equatoriana and in the cocoa industry world-wide. However, a small purchaser, such as Mediterraneo Confectionary Associates, Inc., would not necessarily have heard them. If called on to do so, the relevant personnel for Mediterraneo Confectionary Associates, Inc. would testify that they did not know of the rumors.

Sugar

30. Was sugar contract 2212 on a standard form of Equatoriana Commodity Exporters, S.A.?

Yes.

31. Why did the sugar contract provide that delivery would be made by Oceana Sugar Producers?

As described in the statement of Defense, paragraph 2, Equatoriana Commodity Exporters, S.A. trades primarily commodities produced in Equatoriana, although on occasion it trades commodities produced in other countries. On this occasion it sold sugar produced in Oceania. Shipment of the sugar to Mediterraneo Confectionary Associates, Inc. was directly from Oceania by the party that had sold the sugar to Equatoriana Commodity Exporters, S.A.

32. How trustworthy is the statement on the cargo receipt that the sugar was in “apparent good condition” when it was received by Oceania Shipping Lines?

The first issue is whether the tribunal has jurisdiction in regard to the sugar contract. That is to be considered in the memoranda and the oral hearings during the Moot. Only if the tribunal has jurisdiction will the tribunal consider the merits of the dispute at a time subsequent to the Moot. If the sugar was as bad on arrival as claimed, the dispute would revolve around the question which party bore the risk of loss at the time

the deterioration occurred. According to FOB Incoterms 2000, A5 on Transfer of Risks:

“The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship’s rail at the named port of shipment.”

As stated in the Statement of Defence, para. 15, FOB Incoterms 2000, B5 provides that the buyer bears the risk of loss once the goods have passed the ship’s rail. In addition, the buyer bears the risk of loss in two situations that are not relevant to the facts in regard to this sugar contract. It will be noted that the cargo receipt states only that the carrier has received the sugar but not that it has yet been loaded on a ship. If the deterioration occurred prior to loading, the seller bears the risk of loss. If the deterioration occurred after loading, the buyer bears the risk of loss. The time of the passage of the risk of loss from seller to buyer is an important factor in each of the thirteen different Incoterms 2000.

(Signed)
President of the Tribunal

30 October 2004