ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL
ARBITRATION MOOT

Analysis of the Problem for Use of the Arbitrators

Twenty Nineth Annual Willem C. Vis
International Commercial Arbitration Moot

Vienna Austria
2021/2022

Oral Hearings
9 – 14 April 2022

Organised by:
Association for the Organisation and Promotion of the
Willem C. Vis International Commercial Arbitration Moot

and

Nineteenth Annual Willem C. Vis (East)
International Commercial Arbitration Moot
Hong Kong

Oral Arguments
28 March – 3 April 2022

Organised by:
Vis East Moot Foundation Limited

ANALYSIS OF THE PROBLEM
FOR USE OF THE ARBITRATORS

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, https://www.vismoot.org/wp-content/uploads/2021/11/29th-Vis-Moot_Problem_inkl-PO2.pdf If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 (PO 2).

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are ***strongly urged*** not to communicate any of the ideas contained in this analysis to their teams ***before*** the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem, in particular not all possible interpretations of the various contractual provisions.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

INTRODUCTION

This year's case arises in connection with the – disputed – conclusion of a long term CIF contract providing for the sale of sustainable palm oil by the Claimant (ElGuP) to the Respondent (JAJA Biofuel). The palm oil was originally intended to be used for the production of biofuel. Due to an adverse business climate and environmental compliance issues Respondent lost the interest in the transaction. It denies the conclusion of the contract or in the alternative (irrelevant for the Moot) declares its avoidance for mistake and fundamental breach. The alleged contract is based on a template used in the palm oil industry (FOSFA/PORAM 81) which Claimant had modified for its own purposes. The template used by Claimant now provides for arbitration under the AIAC-Rules and the application of the CISG, to make the dispute "mootable".

The issues to be discussed by the students at the present stage of the proceedings all relate in one way or another to the requirements which exist under the applicable law (which has to be determined first) for the conclusion of a contract and the inclusion of general conditions into it and whether these requirements have been met in the case at hand:

1. In relation to arbitration the sole issue to be discussed is whether the Parties have validly submitted their disputes to arbitration under the AIAC-Rules. That is primarily a question of whether the Parties have validly included Claimant's General Conditions of Sale containing the arbitration clause into the contract. The requirements for a valid inclusion of an arbitration agreement contained in General Conditions of Sale in turn depend to a large extent on the law applicable to the arbitration clause. Based on Claimant's submission the following sub-questions arise:

    a) Is the law of Danubia, as the law of the place of arbitration, governing the conclusion of the arbitration agreement, or the law of Mediterraneo to which the Parties had submitted the main contract?

    b) If it is the law of Mediterraneo, is it the non-harmonized general contract law which governs the inclusion of the arbitration or is it the CISG with its more stringent requirement ?

2. In relation to the CISG the issues to be discussed at the present stage are the following:

    a) Have the Parties validly entered into a contract in 2020?

    b) If the contract was concluded, were Claimant's General Conditions of Sale validly incorporated into the alleged contract?

The two important questions in this respect are the requirements for the inclusion of standard conditions into a sales contract governed by the CISG and to what extent practices and usages existing between the seller and a mother company are also relevant for a wholly owned subsidiary if the same persons are in involved in the conclusion of the contract.

THE FACTS

I. Parties and contractual history[1]

1. Claimant, *ElGuP plc*, is one of the largest producers of RSPO[2]-certified palm oil and palm kernel oil based in Mediterraneo. Its annual production of palm oil lies at around 30,000t and 7.000t of palm kernel oil.

2. Respondent, *JAJA Biofuel*, is a well-established producer of biofuel based in Equatoriana which had been acquired in late 2018 by Southern Commodities, a multinational conglomerate with its headquarters in Ruritania trades in all kinds of commodities, including palm kernel oil. Until its acquisition in 2018 Respondent had only produced biofuel from other food crops but it had been one of the objectives of the new management installed by Southern Commodities to expand into biofuels based on palm oil (Respondent Exhibit R 1).

3. For a long time, Claimant had sold 2/3 of its annual palm oil production, i.e. around 20,000t, under a long term contract to a single customer. Following changes in the attitude to palm oil-based biofuels in the European Renewable Energy Directive (RED II, December 2018) and confirmed reports that two of Claimant's suppliers had forged sustainability certificates, that customer terminated its supply agreement in January 2020.

4. As a consequence of that termination of the long-term supply contract, Claimant had to find a customer for 2/3 of its production of certified palm oil on short notice. With that in mind, Mr Chandra, Claimant's COO, used the Palm Oil Summit in Capital City in Mediterraneo on 28 March 2020 to approach Ms Bupati, the Head of Purchasing for Respondent (Claimant Exhibit C 1).

5. Ms Bupati had for a long time been the main purchase manager for the palm kernel oil section of Southern Commodities. In that function she had concluded around 40 contracts with Mr Chandra for palm kernel oil between 2010 and 2018. In the context of the acquisition of Respondent and the centralization of oil palm oil activities with Respondent, Southern Commodities had installed Ms Bupati in 2019 as Head of Purchasing of Respondent.

6. Given the favorable price of USD 900/t offered by Claimant for a long-term commitment, Ms Bupati showed great interest in purchasing the entire available production of palm oil from Claimant from 2021 onwards for five years. In principle, Mr Chandra and Ms Bupati managed to settle all commercial terms in their negotiations at the Palm Oil Summit. In light of the recent controversies concerning Respondent's palm oil business, Ms Bupati wanted to get approval from Respondent's management first, before entering into such a long-term commitment of a considerable size. Thus, it was agreed that Ms Bupati would get back to Mr Chandra with a definitive offer within the next three days, who would then prepare the contractual documents. That was largely the mode of operation which Mr Chandra and Ms Bupati had established for their numerous palm kernel oil contracts during the years 2010 – 2018.

7. On 1 April 2020, Ms Bupati sent an email ordering 20,000t of RSPO-certified palm oil per annum for the years 2021 - 2025 to be delivered in up to six instalments per annum, delivery starting in

[1] See also the chart at the end of this brief outlining the contractual relationships.
[2] RSPO: Roundtable for Sustainable Palm Oil https://rspo.org/

January 2021 (Claimant Exhibit C 2). These were exactly the commercial terms agreed between the Parties at the Palm Oil Summit.

8. Mr Chandra had his assistant Mr Rain prepare the necessary contractual documents. In line with the practice established with Ms Bupati in previous transactions, the Contract was based on Claimant's contract template into which the details of the offer were incorporated (Claimant Exhibit C 3).

9. On 9 April 2020, Mr Rain sent the Contract signed by Mr Chandra to Ms Bupati's assistant, Ms Fauconnier. The accompanying letter explicitly mentioned that the Contract would be governed by the law of Mediterraneo and that the purchase would be subject to the Claimant's General Conditions of Sale (GCoS) (Claimant Exhibit C 4).

10. The GCoS were not included in the letter or the documents sent. It is, however, uncontested that Ms Bupati had received a copy of Claimant's largely identical pre-2016 GCoS in 2010 when she was still working for Southern Commodities and had at least been informed orally by Mr Chandra in 2016 about the changes to the arbitration clause and their background.

11. In addition, the letter named Mr Rain as the relevant contact for all questions concerning the Contract and asked for the return of one of the signed versions for Claimant's "files and the necessary paperwork for shipment" (Claimant Exhibit C 4).

12. On 3 May 2020, Ms Fauconnier contacted Mr Rain to set up a meeting to discuss issues concerning the letter of credit which Respondent was required to open under the Contract. She asked for a list of acceptable banks and wanted to clarify the documents to be presented for payment. In the call finally agreed between them, Mr Rain pointed out that so far no signed copy of the Contract had been received and Ms Fauconnier promised that she would look into that (Claimant Exhibit C 5). A signed copy of the Contract was, however, never sent. In light of the fact that in previous transactions conducted by Ms Bupati for Southern Commodities she had not always returned the requested signed versions of the contract, Claimant was not worried and did not follow up on that.

13. That changed on 29 October 2020, when Claimant learned from an article in Commodities News that Respondent's CEO, Ms. Youni Lever, had announced in a press conference that, in light of ongoing protests against Respondent's palm oil activities, Respondent had stopped all further negotiations with Claimant concerning the delivery of palm oil and was potentially reconsidering its palm oil-based biofuel activities (Claimant Exhibit C 6).

14. Mr Chandra immediately called Ms Bupati trying to clarify the issue. He was told that she was on holiday but would call him back immediately upon her return. The next day, on 30 October 2020, Claimant received a letter from Respondent's CEO. In that letter Ms Lever declared the termination of any further negotiations on the delivery of palm oil and additionally renounced all existing contractual relations, allegedly due to information about Claimant's infringements of basic RSPO standards (Claimant Exhibit C 7).

15. Four days later, Ms Bupati finally returned Mr Chandra's phone call. She largely confirmed the content of the letter and suggested that Mr Chandra discuss the issue with Respondent's COO, Mr Fotearth.

16. Over the course of the next month there were several rounds of negotiation between Mr Chandra and Mr Fotearth - to no avail. Equally, a mediation effort between the Parties under the agreed upon AIAC Mediation Rules largely failed.

17. The Parties could neither agree on whether their dispute should be solved in arbitration nor on the substance of the dispute. At least, it was agreed between the Parties in the mediation that Mr Chandra should sell the quantities for the year 2021, if necessary with a further price reduction. That reduction would then become part of a damage claim, should an Arbitral Tribunal or the otherwise competent state court conclude that the Parties had entered into a valid contract in spring 2020 which had not been terminated by Respondent (Claimant Exhibit C 1). While Mr Chandra was able to find other buyers for the quantities sold to Respondent under the Contract for 2021, he has not yet been successful for the remaining quantities.

18. A chart summarizing the relevant communications is attached as Annex 1.

II. Initiation of arbitration and Statement of Relief

On the basis of the above facts, Claimant has asked the Arbitral Tribunal for the following orders (of which only 1, 2 and parts of 3 are relevant for the written or oral submissions at this stage):

1) To declare that the Arbitral Tribunal has jurisdiction to hear the case.

2) To declare that the Parties entered into a valid contract for the delivery of 20,000t/annum of RSPO-certified palm oil for the years 2021 - 2025

3) To declare that Claimant's General Conditions of Sale were validly incorporated into that Contract *and exclude any termination of the Contract for temporary infringements of the RSPO requirements before Claimant was given a suitable period of one month to remove such infringements by its suppliers.*

4) To declare that Respondent has not validly avoided the Contract either for mistake or for a fundamental breach of contract.

5) To order Respondent to compensate Claimant for the damages incurred for the failure to accept the deliveries of the quantities for the year 2021 in the amount of USD 200,000 plus interest thereon.

6) To order Respondent to perform the Contract for the years 2022 - 2025.

7) To order Respondent to bear the costs of these arbitration proceedings, including the cost incurred by Claimant for legal representation.

On 14 August 2021 Respondent submitted its Response to the Notice of Arbitration. It asked the Arbitral Tribunal to make the following orders.

1) To reject all claims made
2) To order Claimant to bear the costs of this arbitration

In essence, Respondent contends that the Parties had not yet concluded a valid contract when on 30 October 2020 Respondent's CEO Ms. Lever wrote to Claimant terminating the negotiations

due to the non-compliance of Claimant's suppliers with the standards of sustainable oil production. In the alternative, which is, however, not relevant for the Vis Moot, Respondent submits that it was entitled to terminate any existing contract because of the violations of the RSPO standards by Claimant's suppliers. In its view they either constituted a fundamental breach of contract or entitled Respondent which was not aware of them to terminate the contract for mistake.

THE ISSUES

I. Overview

In a telephone conference on 7 October 2021 the Parties agreed on some procedural issues, in particular, that

- the proceedings will be conducted on the basis of the 2021 AIAC Rules - Global Solution;
- the first phase of the Arbitration will be limited to questions listed below addressing the Arbitral Tribunal's jurisdiction and conclusion of the Contract and the eventual inclusion of Claimant's General Conditions of Sale,

Following that, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 (PO 1) para. III (1). It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

a. Have the Parties validly agreed on the jurisdiction of the Arbitral Tribunal?
    i. What is the law governing the Arbitration Agreement?
    ii. Is the CISG applicable to the conclusion of the Arbitration Agreement in the event it is governed by the law of Mediterraneo?
b. Have the Parties concluded a contract in 2020?
c. If a contract was concluded, were Claimant's General Conditions of Sale validly incorporated into that contract?

II. General considerations

Given the close connection between the procedural issue (valid submission to arbitration) and the substantive questions (conclusion of the main contract/valid inclusion of the general terms) one of the central questions – in particular for Claimant – is how to structure its submission to avoid duplications and make a convincing argument. The Parties are in principle free to select the order in which they address the various issues (PO 1 para. III (1) last sentence). Deviating from the "usual practice", adopted by the majority of teams, it may make sense to start in this case with the substantive issues before addressing the jurisdiction of the tribunal. In that case the Parties would argue first the conclusion of the main contract and the incorporation of the general conditions into the contract and then address the procedural issues. They would argue that the arbitration clause has become part of the contract, even if the remainder of the General Terms of Sale did not, because it is governed

by different rules, which impose less stringent requirements as to the inclusion of General Conditions.

In relation to the merits, PO 1 states explicitly that beyond the two questions under b) and c), no further questions referring to the merits of the claims should be addressed. In particular, no questions relating to a possible breach of contract or the right to terminate the contract should be argued.

The following remarks are merely intended to highlight the legal issues arising from the Problem. They follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission (and to suggest an order for the oral hearings, should the Parties not have agreed upon an order).

III. The Jurisdiction of the Arbitral Tribunal: Procedural Order No 1 para. III (1 a)

1. Background

Claimant bases the arbitration on the following dispute resolution clause contained in Claimant's General Conditions of Sale:

> "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules.
> The seat of arbitration shall be Danubia.
> The language to be used in the arbitral proceedings shall be English.
> This contract shall be governed by the substantive law of Danubia.
> Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation."

That clause had been incorporated into included in the GCoS since 2018 and is based on the AIAC Model clause at the time. Unlike the new model clause, it does not contain an express choice of the law governing the arbitration agreement as such.

The contractual documents sent by Claimant to Respondent clearly state that the contract is subject to Claimant's GCoS. The Contract itself (Claimant Exhibit C 3) provides in the last line of the header box: "*Seller's General Conditions of Sale apply*". Furthermore, Mr Rain's email of 9 April 2020 (Claimant Exhibit C 4) by which the Contract documents were sent to Respondent explicitly mentions that

> "[i]n addition, Claimant's[3] General Conditions of Sale apply to issues not regulated in the attached document".

The GCoS were not provided to Respondent with the contractual documents. Claimant is of the view that this was not necessary as the conditions were known to Ms Bupati from her

[3] Should have been „Seller's" see correction in PO 2 para. 40b.

previous dealings with Claimant when she was still working for Southern Commodities. It is undisputed that the GCoS were sent to Ms. Bupati in 2010 and have since then remained largely unchanged.

One of the few changes made, however, concerned the arbitration clause contained in Clause 9 of the GCoS. In 2010, Clause 9 of the transmitted GCoS still included an arbitration clause in favor of arbitration under the PORAM Rules of Arbitration and Appeal (Respondent Exhibit R 4). It was a copy of the arbitration clause contained in Clause 9 of the FOSFA/PORAM 81 contract template which Claimant had included at the same time as Clause 9 of the modified template it used for its own contracts.

In 2016, following an unsatisfactory arbitration between Claimant and Southern Commodities in 2014, which in Claimant's view had been badly administered, Claimant replaced the original arbitration agreememt in Clause 9 of the GCoS by a clause providing for arbitration under the rules of the Kuala Lumpur Regional Center for Arbitration. At the same time it removed the arbitration clause from its customized and shortened contract template. While the arbitration clause in Clause 9 of the contract template was completely dropped, the non-specific reference to that clause in Clause 7 was overlooked. In 2018, after the renaming of the KLRC to AIAC, the otherwise identical 2016 arbitration clause was replaced by the above-cited arbitration clause, which was the AIAC model clause at the time (PO 2 paras. 24 - 26).

It is not clear whether after the changes to the arbitration clause in 2016 Mr Chandra had sent a new version of the GCoS to Ms Bupati in connection with the first contract concluded between them under the new GCoS. They were not incorporated into the following seven contracts concluded between Claimant and Southern Commodities. It is, however, uncontested that Mr Chandra had orally informed Ms Bupati about the change of the arbitration clause.

The second relevant change to the GCoS concerns the choice of law clause in relation to the merits. With the changes to the arbitration clause in 2016 the previously independent choice of law provision in Clause 9bis became part of the arbitration clause in Clause 9, providing for the application of the "substantive Law Danubia". More important than this merely formal change in 2016 are the statements by Mr Chandra and Mr Rain in the context of the negotiations in spring 2020. At their first discussion at the Palm Oil Summit Mr Chandra had informed Ms Bupati that – deviating from their previous practice – the contract was supposed to be governed by the law of Mediterraneo and not the law of Danubia. In their email of 1 April 2020 (Claimant Exhibit C 2) Ms Bupati told Mr Chandra that "the submission of the sales contract to Mediterranean Law, which you mentioned as your company's new policy is less a problem for us than the submission to arbitration". In addition, Mr Rain in his email of 9 April 2020 to the Respondent attaching the contract signed by Claimant only, stated that, "Mr Chandra asked me to point out that in deviation from the previous practice established between Ms Bupati and Mr Chandra, the sale will be governed by the law of Mediterraneo". Whether that choice of the main contract, not yet reflected in the GCoS, also extends to the

arbitration clause, or whether the latter is governed by Danubian law as the law of the place of arbitration, is the first question to be determined in connection with the jurisdiction of the arbitral tribunal.

Rule 13.5 (a) of the AIAC Arbitration Rules 2021 explicitly empower the arbitral tribunal to determine the law governing the arbitration agreement in the absence of an agreement by the parties.

2. Discussion

The problems concerning the valid inclusion result from the following two facts:

- Respondent has not sent back a signed version of the contractual documents
- Claimant has not provided Respondent with a copy of the GCoS

The latter fact could raise problems for the inclusion of the arbitration agreement in Clause 9 of GCoS if the inclusion of the arbitration agreement is – like the main contract – governed by the law of Mediterraneo including the CISG. In that case – and if no deviating practice or usage can be established leading to the inclusion of the arbitration clause, the mere reference to the application of the GCoS in the Contract and the Mr Rain's email of 9 April 2020 (Claimant Exibit C 4) may not be sufficient for their inclusion. According to the prevailing view the CISG requires in general for the inclusion of standard conditions that they are either sent to the other party or are made available in another way or are known by the other party.

That additional requirement of "making available" under the CISG may at the same time result in problems concerning the fulfilment of the form requirements. In relation to the form of the arbitration agreement Danubian arbitration law provides in the pertinent part of Article 7 (Option 1 ML 2006):

> (2) The arbitration agreement shall be in writing.
> (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
> (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accesssible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
> (…)
> (6) The reference in a contract to any document containing an arbitration clause

constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

If the CISG governs the arbitration agreement, the reference in the Contract to the GCoS and the therein included arbitration clause will – in the absence of a practice or usage – not "make that clause [Clause 9] part of the contract" as required by the form requirement of Art. 7 (6).

The situation would be different if Danubian substantive law is applicable to the arbitration agreement. Under Danubian law the clear reference in the contract that the GCoS apply would probably be sufficient for the valid inclusion of the GCoS - including the arbitration clause. Danubian Law is based on the UNIDROIT Principles which provide in Art. 2.1, "A contract may be concluded either by acceptance of an offer or by conduct of the parties that is sufficient to show agreement."

Consequently, the Claimant's first line of argument is that the conclusion of the arbitration agreement is governed by the law of Danubia, as the law of the place of arbitration, or (more difficult to argue) as the law chosen by the parties for the arbitration agreement. Under Danubian law the clear reference in the contract to the application of the GCoS would be sufficient to make the GCoS part of the contract and thus also fulfill the form requirements.

For <u>that</u> question, as to the law governing the arbitration agreement, the following facts and considerations may be relevant:

- Scope and nature of the doctrine of separability of the arbitration agreement as specifically regulated in Rule 20.1 (a) AIAC Arbitration Rules 2021 – in light of the express choice of Mediterranean law for the main contract which was, however, not yet reflected in the arbitration clause in the GCoS;
- Originally, the law of Danubia had also been the law applicable to the contract and the change of the law governing the contract was solely driven by considerations concerning the sales side of the contract, while the Claimant maintained Danubia as the place of arbitration; and
- Discussion about arbitration clause, Respondent's problems with submitting to arbitration, Claimant's unwillingness to agree on other forms of dispute resolution during Palm Oil Summit (C4 para. 12) and the order email (C 2).

Claimant's second line of argument is that even if the choice of the law of Mediterraneo should extend also to the arbitration clause, it would be the non-harmonized law of Mediterraneo and not the CISG which governs the conclusion of the arbitration clause. The latter is considered to be a separate contract; one may argue that the CISG applies only to contracts of sales but not to arbitration agreements.

The third line of argument is not specific to the arbitration agreement but suggests that even under the CISG, the GCoS have been incorporated into the contract due primarily to a practice

established between the parties. The argument is identical to the second CISG-issue and details will be provided there.

The different potential lines of argument raise tactical consideration in which order they will presented. The advantage of the order in which the arguments are presented above is that there are two auxiliary arguments if the first one fails. It may, however, be counterintuitive to argue that from the GCoS only the arbitration clause is included, as it is not governed by the CISG, while the remaining provisions which are governed by the CISG are not. The disadvantage of the opposite approach, arguing primarily that the arbitration is included under the CISG and only auxiliary that its inclusion is governed by a different law, is that this may considerably weaken the auxiliary arguments.

The following table gives an overview on the potentially applicable laws and their effects on the conclusion of the arbitration agreement:

	Danubia	Mediterraneo	Equatoriana	Ruritania
CISG-State Application of CISG to Arb Clauses	No	Yes Conflicting decisions of lower courts	Yes CISG applied to conclusion and interpretation of Arb Clauses	Yes Application of CISG to Arb Clauses generally rejected
Contract Law	UNIDROIT Principles	UNIDROIT Principles	UNIDROIT Principles	UNIDROIT Principles
Arbitration Law	ML 2006 – Art. 7 Option 1	ML 2006 – Art. 7 Option 2	ML 2006 – Art. 7 Option 1	ML 2006 – Art. 7 Option 2

IV. Conclusion of a contract in 2020: Procedural Order No 1 para. III (1 b)

1. Background

During the negotiations at the Palm Oil Summit Mr Chandra and Ms Bupati largely agreed on the commercial terms of the contract, in particular the goods in question, the quantity, the price and the duration of contract. Ms Bupati, however, made clear that in light of the size and the duration of the contract and the widespread hostility in Equatoriana to both palm oil and to arbitration, she wanted to discuss the contract first with her management and promised to get back to Mr Chandra within the next three days.

In her email of 1 April 2020 (Claimant Exhibit C 2), Ms Bupati informed Mr Chandra that despite the "temporary anti palm oil movement," Respondent was still committed to expand its palm oil activities. She was thus interested in "securing a long-term supply at the conditions we discussed at the summit". In light of that, she placed "the following order with you as agreed at the Summit," and asked Mr Chandra to "prepare the necessary contractual documents for signature and [to] send them to my assistant, Adrienne Fauconnier". She assumed that the documents would be largely comparable to those used by Claimant in its previous dealings in palm kernel oil with her former employer, Southern Commodities and be based on Claimant's shortened version of the FOSFA/PORAM Model contract. She also made clear that while she had not problems with the application of the law of Mediteranneo to the contract, the arbitration clause could be more problematic, "in particular if we submit to an institution which exclusively deals with palm oil".

On the basis of this email, Mr Rain then prepared the contractual document by inserting the terms of the order into Claimant's contract template. After signature by Mr Chandra, Mr Rain sent two copies of the contract to Ms. Fauconnier and asked her "to sign one copy and return it to me for my files and the necessary paperwork for the shipments". No signed copy was returned in the following weeks. Instead Ms Fauconnier contacted Mr Rain in early may to discuss details concerning the letter of credit, in particular which banks would be acceptable as "recognized banks" and whether the documents to be submitted under LC could be changed. Furthermore, she wanted to know whether the arbitration clause could be changed at least by providing for some additional transparency.

During the discussion Mr Rain apparently managed to give her the required information and to address her concerns. At least, Ms. Fauconnier did not ask for further information or changes but promised to look into the missing signed copy of the contract. She, however, never got back to Mr Rain before Ms Lever's termination letter of 30 October 2020.

2. Discussion

There a several points in time when the contract could potentially have been concluded and it can be expected that teams will argue several of them. The four most likely of them are in chronological order:

- 1 April 2020 when Respondent placed its order based on the terms agreed at the Palm Oil Summit (Offer: at Summit – Acceptance: through order),
- 9 April 2020 when Mr Rain sent the signed version of the contract (Offer: Order of 1 April – Acceptance: via letter of 9 April)
- One week after 9 April (Offer: letter of 9 April – Acceptance: through silence – usage)
- In May 2020 during the discussions between Mr Rain and Ms. Fauconnier (Offer: letter of 9 April – Acceptance: performance of contract by discussing LC).

It will be difficult, but not impossible, to argue that the Parties had concluded a contract at the Palm Oil Summit. While the Parties had agreed on the essential commercial terms, both Parties were aware that Ms. Bupati intended to get approval for the contract from her management.

In discussing the conclusion of a contract at any of these points, a crucial question may be whether a particular practice or usage exists between the Parties concerning contract conclusion. Such a practice or usage could have been created by the previous dealings of Mr Chandra and Ms Bupati, who between 2010 and 2018 concluded around 40 contracts for palm kernel oil. At the time Ms Bupati was, however, still working for Southern Commodities. This raises the question of whether a practice or usage established between Claimant and Southern Commodities would also be binding for Respondent. Though Respondent had been acquired by Southern Commodities, it remained a separate legal entity. Facts which may be relevant in this context are:

- that the contract had been negotiated and concluded by the same persons who had established the practice between Claimant and Southern Commodities (Mr Chandra / Ms Bupati) unless one considers Mr Rain and Ms Fauconnier to be the crucial persons - who were apparently not aware of the entire previous history;
- transfer of the entire palm oil business from Southern Commodities to Respondent including personnel and ongoing contracts; and
- references by Ms Bupati to the previous practices in her email of 1 April 2020.

A second issue in this context is that the contracting practice between Claimant and Southern Commodities is not completely consistent, particularly regarding the signature requirement and how deviating acceptances are treated. While in the majority of cases a signed version of the contract was returned, that was not always the case. There had been five instances in which no signed contract was returned but the contract was nevertheless performed (eg PO 2 para. 10). One of these unsigned contracts even led to the arbitration between Claimant and Southern Commodities in 2014 (PO 2 para. 24). A further factor which may be relevant for formulating the existence of a relevant practice between Claimant and Southern Commodities is that Ms Bupati had in three cases raised objections against the documents sent to her. Each time, these objections had been raised within a week. In essence, whether the existence of a practice between Claimant and Southern Commodities can be established may depend on how the content of such practice is defined.

In the present case, doubts as to the conclusion of the contract arise primarily from the fact that Respondent never returned a signed version of the contract as requested by Claimant. That in itself does not prevent the conclusion of the contract. The CISG does not impose any form requirement and there is at least no express agreement of the parties on a contractual form requirement. There have been cases in the past where Ms Bupati did not return signed copies of the contracts but both Parties considered themselves bound.

In the present case, however, the parties' communications and actions are also ambiguous and can be interpreted in different ways. It is not completely clear whether the parties have reached an agreement on all points they needed to agree upon. In this context Ms Fauconnier's email of 3 May 2020 (Respondent Exhibit R 2) and the subsequent discussion with Mr Rain will be interpreted differently by the Parties. Respondent will see it as a clear

sign that the parties were still in the process of negotiations while for Claimant these are mere clarifications of issues and requests for amendments of the contract. The wording of the email and the relevant parts of Mr Rain's witness statement (Claimant Exhibit C 5) are vague and give arguments for both views.

Relevant points in relation to the discussion of the contract conclusion could be:

- uncertainty in relation to arbitration agreement and applicable law at Summit and in letter of 1 April;
- wording of various communications pointing to agreement / negotiations; and
- behaviour of Ms Fauconnier and Mr Rain.

V. The inclusion of Claimant's GCoS into the contract: Procedural Order No 1 para. III (1 c)

1. Background

As set out in detail above under Part III, the contractual documents as well as the letter accompanying them clearly state that the contract should be governed by Claimant's GCoS. The current GCoS have, however, never been provided to Respondent. An earlier version of the GCoS, however, had been sent to Ms. Bupati when she was still working for Southern Commodities, although she no longer has access to them. Furthermore, Ms Bupati was orally informed about the relevant changes in relation to the arbitration clause. Her letter of 1 April 2020 shows however, that she had forgotten about the change in the arbitration agreement when she made the offer.

2. Discussion

In case a contract has been concluded, the inclusion of the GCoS will be governed by the CISG. It is uncontested that Claimant had informed Respondent that the contract would be governed by the law of Mediterraneo, which includes the CISG. Thus, the Parties have to argue the inclusion of the GCoS under the CISG.

As the CISG does not contain any specific rules for the inclusion of general terms, the general rules on contract formation apply. As set out above, these rules are interpreted by the majority of authors and courts to require that the GCoS are either sent or otherwise made accessible to the other party. While there are good arguments for such an additional requirement for the inclusion of standard terms, such an interpretation is not required by the wording of the relevant provisions.

Even if one follows the majority view as to the "making available" requirement, one may argue in different ways that in the present case it was either fulfilled by the transmission of the GCoS in 2010 or unnecessary, primarily because Ms Bupati knew the content of the GCoS. Again, one of the questions is whether knowledge of a mother company can be attributed to an independent subsidiary when the same person has that knowledge and acts upon it.