

“贸仲杯”国际商事模拟仲裁竞赛 课程 及
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
笔试题目

要求:

请仔细阅读第 29 届 VIS MOOT 案卷及本文档第 2-6 页案情简介（卷宗全文请见文档第 6 页链接），在 QUESTION1、QUESTION2、QUESTION3、QUESTION4 中**任择其一**，并选择一个持方（Claimant 或 Respondent），使用**英文**作答。

请援引**相关文献**（裁判案例、学术著作等）佐证你的观点，并将参考文献的出处以**脚注**的形式标注。

请使用 12 号字，Times New Roman 字体，上下左右页边距 2.5cm，1.5 倍行距，另附纸作答。请在答题文档起始处注明中文姓名、学号、电话、电子邮箱，以及你选择作答的 **QUESTION** 及持方。

QUESTION 1: Jurisdiction

Please (i) summarize the relevant facts of jurisdiction issue within 300 words and (ii) analyze what is the law governing the Arbitration Agreement, within 1000 words.

QUESTION 2: Jurisdiction

Please (i) summarize the relevant facts of jurisdiction issue within 300 words and (ii) analyze whether the CISG is applicable to the conclusion of the Arbitration Agreement in the event it is governed by the law of Mediterraneo, within 1000 words.

QUESTION 3: Merits

Please (i) summarize the relevant facts of substantive issue within 300 words and (ii) analyze whether the Parties have concluded a contract in 2020, within 1000 words.

QUESTION 4: Merits

Please (i) summarize the relevant facts of substantive issue within 300 words and (ii) analyze if a contract was concluded, whether Claimant’s General Conditions of Sale were validly included into that alleged contract, within 1000 words.

THE FACTS

I. Parties and contractual history

Claimant, ElGuP plc, is one of the largest producers of RSPO2-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.

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.

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.

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.

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.

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.

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 January 2021. These were exactly the commercial terms agreed between the Parties at the Palm Oil Summit.

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.

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).

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.

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".

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. 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.

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.

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.

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.

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.

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. 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.

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

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?

全部案卷与官方分析报告，请见：

链接：<https://pan.baidu.com/s/16WjcMqliox3HxplHIlzCbw>

提取码：1111

更多赛事信息详见 VIS 官网链接：

<https://www.vismoot.org/>