GAFTA APPEAL NUMBER: 0000

IN THE MATTER OF THE GRAIN AND FEED TRADE ASSOCIATION ("GAFTA") ARBITRATION RULES NUMBER 125

IN THE MATTER OF AN ARBITRATION

B E T W E E N :-

[GENEVA TRADING S.A.}
Geneva, Switzerland

APPELLANT SELLERS

-AND-

[DUBIA TRADING CO]
Dubai, United Arab Emirates

RESPONDENT BUYERS

AWARD

APPEAL

1. This arbitration arises by way of an Appeal against the Award made by the GAFTA Tribunal ([Mr B.A. Long], [Mr B.A. Flower] and [Mr C.A. Water]) on 4th March 2002 in which the Tribunal awarded the Appellant Sellers damages in the sum of US$28,000 together with interest. It is the Appellant Sellers' case that the Tribunal erred in their Award by granting insufficient damages. Thereby, in this Appeal the Appellant Sellers seek a higher award in damages in the sum of US$224,000.00.

ISSUE

2. The dispute between the Parties arises out of the sale of 28,000 metric tonnes of Romanian Milling Wheat and the Appellant Sellers bring a claim for default against the Respondent Buyers for failing to take up the purchase of this consignment of Romanian Milling Wheat. The Appellant Sellers base their case, in their default claim, upon the difference in price of the Romanian Milling Wheat between the contract price and the market price at the date of default. The Respondent Buyers do not dispute the contract price nor the default. There are, therefore, just two matters before us: what was the date of default and what was the market price of the wheat at the date of default?

SEAT OF ARBITRATION AND GOVERNING LAW

3. The juridical seat of this arbitration is England and the governing law is English law. Thereby the English Arbitration Act 1996 governs the conduct of this arbitration.

PARTIES

4. The Appellant Sellers are Geneva Trading S.A. ("[Geneva Trading]") and the Respondent Buyers are Dubai Trading Co ("[Dubai Trading]"). The independent brokers were Monaco S.A. ("[Monaco]") who confirmed the contract in writing by [Monaco] to [Dubai Trading] on 30th August 1999.

SUBMISSIONS AND HEARING

5. [Mr Francis Perrot] acted as the representative of the Appellant Sellers throughout the conduct of this Arbitration Appeal. [Smith & Smith], London Solicitors, acted as the representative of the Respondent Buyers in all the written submissions. At the oral hearing on 7th October 2003 the Respondent Buyers were represented by Mr Hasson Yousuf. The oral hearing was originally fixed to take place on 2nd July 2002 but, at the request of both Parties the oral hearing was adjourned for two months while the Parties entered into settlement negotiations. There then followed various further adjournments and the oral hearing was not 're-instated' until the Appellant Sellers notified us that there was no longer a prospect of settlement.

6. Prior to the date of the original oral hearing (on 2nd July 2002) we had placed before us the written submissions of 22nd April 2002 of the Appellant Sellers, the written submissions of the Respondent Buyers of 20th May 2002 and the written reply submissions of the Appellant Sellers of 17th June 2002. Pursuant to our Order of 9th October 2003, which confirmed in writing the order which we intimated at the hearing we wished to make, the Appellant Sellers made further written submissions to us on 28th October 2003 and the Respondent Buyers made further submissions to us on 18th November 2003. The Appellant Sellers replied to these further submissions in its further submissions of 28th November 2003 - reaching us until 8th December 2003.

7. In reaching this Award we have taken account of all of these written submissions and of all the oral submissions made to us at the hearing on 7th October 2003.

CONTRACT

8. For the purpose of this arbitration, the relevant terms of the contract, as confirmed in writing on 30th August 1999, ("the Contract") are:-

"QUANTITY: *28,000…Metric Tons 10% more or less at Buyer's option and at contract price*

COMMODITY: *ROMANIAN MILLING WHEAT IN BULK (99 Crop)*

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PRICE: *USD107.00…per metric ton*

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PARITY: *FREE ON BOARD CONSTANTZA….*

SHIPMENT: *NOVEMBER 1999 at Buyer's option with a pre-advice of 8 running days and a definit*[e] *pre-advice of 4 working days.*

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PAYMENT: *100% at sight by irrevocable and confirmed letter of credit issued to first class bank in EUROPE acceptable to SELLERS, confirmation charges to be for Seller's account. This letter of credit to be opened at sight latest by Wednesday 20th October 1999*

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All other conditions and terms as per GAFTA 64
ARBITRATION: LONDON AS PER GAFTA 125."

OUTLINE OF FACTS

9. The Respondent Buyers did not open the letter of credit, as required by the Contract, by 20th October 1999. Some time passed and on 29th December 1999 the Appellant Sellers sent a fax to the Respondent Buyers asking them to:

> *"…take necessary measures to open irrevocable letter of credit…by latest January 5th 2000…"*

In this fax of 29th December 1999 the Appellant Sellers went on to state that if the Respondent Buyers failed to issue this letter of credit by 5th January 2000, it

"….will have no other alternative than to [sell] against you and to claim from you compensation of any costs resulting from this situation."

10. It appears that the Respondent Buyers did not issue a letter of credit within the new timetable given to them by the Appellant Sellers but wrote in a fax of 12th January 2000 that they were:

> *"….putting in hand arrangements to open a letter of credit. Matters have been delayed by reason of the very serious concerns as to the cargo loaded onto "Blue River". We have already lost significant sums and have incurred significant losses, damages and expenses and our rights are fully reserved as to these. Please ensure that the cargo to be presented under the*

next lifting will be in first class condition and that there will be no problems, difficulties or delays…like those in relation to 'Blue River'"

11. On the next day (13th January 2000) the Appellant Sellers took it upon themselves to send by fax to the Respondent Buyers a debit note based upon the alleged default of the Respondent Buyers in purchasing the Romanian Milling Wheat. This fax of 13th January 2000 stated as follows:

"PLEASE FIND ATTACHED OUR DEBIT NOTE FOR DEFAULT 28,000 MT ROMANIAN MILLING WHEAT

THANKS TO CONFIRM REMITTANCE

BEST REGARDS/M.R.A.T. GENEVA"

The accompanying debit note was based upon the default date being 21st October 1999 and hence it claimed the difference in price between the "Contract Price" of US$107 per metric ton and the "average market price" (on 21st October 1999) of US$99 per metric ton. Based, therefore, on the difference in price (between the contract price at US$ 107 per mt and a market price of US$99 per mt) of US$8 per metric ton, the Appellant Sellers' debit note (dated 12th January 2000 but sent with its fax of 13th January) claimed US$224,000.00 for the Respondent Buyers' default in completing this purchase. Thereafter, in a fax sent in reply on 13th January, the Respondent Buyers asserted that, while they had *"put in hand arrangements for the letter of credit"* to be issued they were *"awaiting a satisfactory response"* from the Appellant Sellers upon

the proper quality of the cargo and upon the problems and delays which the Respondent Buyers alleged they had suffered (concerning another and separate transaction with the Respondent Buyers) with the cargo carried in 'M/V Aliacom River'. In the circumstances the Respondent Buyers rejected *"any liability"* towards the Appellant Sellers adding that they could not *"accept any liability or responsibility for* [the Appellant Sellers'] *debit note"*.

12. Thereafter on 19th January 2002, the Appellant Sellers, in the absence of payment by the Respondent Buyers of the default claim of US$224,000.00, commenced arbitration proceedings.

APPELLANT SELLERS' SUBMISSIONS

13. The central submission of the Appellant Sellers can shortly be stated. It is this. It was an express term in the Contract that the Letter of Credit had to be *"opened at …. latest by Wednesday 20th October 1999".* The Respondent Buyers failed to arrange for this to be done by that date and at all. The test is, therefore, when the contract should have been performed. According to the cases of Bremer Handelsgesellschaft Schaft MBH v Vanden Avenne Izegem PVBA [1978] 2 Lloyd's Rep 109 ("Bremer")and of Alfred C. Toepfer v Peter Cremer [1975] 2 Lloyd's Rep 118 ("Toepfer"), which the Appellant Sellers cite, the last date upon which a contract could have been performed should be basis for fixing the date of default. Hence, in this instance, the Respondent Buyers first came into default on the day after the last day for issuing the Letter of Credit. Thus the default date should be fixed as 21st October 1999.

14. The Appellant Sellers go onto to make the point that once a default date has been established then any later time selected for holding the

defaulter in default does not vitiate the established default date. For this proposition, the Appellant Sellers cite the case of Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA [1979] 2 Lloyd's Rep 98 ("Toprak") in which Mr. Justice Robert Goff, wholly supported on appeal by a strong Court of Appeal (Master of the Rolls Lord Denning, Lord Justice Roskill and Lord Justice Cumming-Bruce) held, at page 109, that:

> *"….the mere fact that* [the innocent party] *waits, and does not treat the other party as in default until a later date, does not mean that, for the purposes of the* [default] *clause, the "date of default" is changed; that date remains the day when the time for performance came and went without due performance."*

15. In rejecting the submission of the Respondent Buyers, who relied upon the earlier case of Etablissements Chainbaux SARL v Harbormaster Ltd. [1955] 1 Lloyd's Rep 303 ("Chainbaux") in which Mr.Justice Devlin held that where a party has allowed a contractual term, requiring a step to be taken by a certain time, to go by, it is necessary for that party

> *"… to make time of the essence of the contract again …. giving the other side* [a notice setting out] *what is a reasonable time to comply with their obligations and … only after* [the other side fails to comply*] is* [that party] *entitled to cancel the contract"*

the Appellant Sellers assert that

(i) the Toprak case was making a precise ruling on a GAFTA Contract default clause while the Chainbaux case was not;

(ii) in the Chainbaux case, there was no established *"default of an obligation expressly incurred"*

(iii) on the facts in this arbitration, the Appellant Sellers had not let time *"go by"* but had given the Respondent Buyers an opportunity to put right their default – an opportunity which the Respondent Buyers refused to take up.

16. On the issue of damages, the Appellant Sellers initially relied, for establishing the market price on 21st October 1999, upon two valuations: one from Grains BV ("[Grains]") of 16.9.99, which set the market price on the default date at US$100.00, and the other from Agrar BV ("[Agrar]") of 10.1.00, which set it at US$98.00. Thus taking an 'average' market price of US$99.00, the Appellant Sellers sought to calculate the difference between the contract price (US$107.00) and the market price (US$99.00) at US$8.00 and put forward a damages claim on the cargo of 28,000 metric tons of US$224,000 (28,000 metric tons x US$8.00).

17. However in their reply submissions of 17th June 2002 the Appellant Sellers acknowledged that there was a difference in the specifications for the cargo between those which were set out in the contract and those which were given to [Grains] for its valuation of 16.9.99. Relying, therefore, upon further advice from [Mr. Alain Pierre] of [Grains] that the correct market price for the default date should be raised by *"$3 to $4"* (ie up to US$103.00 or US$104.00 per metric ton) the Appellant Sellers reduced their claim for damages to a calculation of the contract price at US$107.00 less an average of the above market price of US$103.50 - bringing down the difference in price to US$3.50 per metric ton and the total claim to US$98,000.00. Somewhat cheekily the Appellant Sellers suggested alternatively we might like set the difference in price at

US$4.00 and award damages calculated at US$112,000 but we note it was not suggested to us that we could go the other way and settle the difference in price at US$3.00!

18. In their submissions of 28th October 2003, in response to our request to the Parties to re-visit their respective evidence upon the calculation of the market price on the date of default (whether that be on 21st October 1999 or 13th January 2000), the Appellant Sellers do not put forward new submissions on their damages claim (as they also did not in the final submissions of 28th November) but did submit new evidence from [Mr. Albert Benson] of [Brokerage] and [Mr. Cyril Smart] of [Wheat SA]. In this new evidence [Mr. Albert Benson] set the market price on 20th October 1999 (not 21st October) at US$104.00 and [Mr. Cyril Smart] set the market price on 13th January also at US$104.00. The final evidence, therefore, from the Appellant Sellers on the market price at the October 1999 date of default produces a difference in price between the contract price and the default date market price of US$3.00 which brings, for the cargo of 28,000 metric tons of Romanian Milling Wheat, the Appellant Sellers' damages claim to US$84,000.

19. Finally we note that the Appellant Sellers ask for interest on the damages, which they claim, at compound rates and ask for an Order for Costs (described as "fees") in their favour for the First Tier Hearing and for this Appeal.

RESPONDENT BUYERS' SUBMISSIONS

20. At the outset of their submissions, the Respondent Buyers expressly admit they did not open a Letter of Credit on 20th October 1999 and, by

implication, also admit they never opened any Letter of Credit as required of them by the Contract.

21. Their principal argument, throughout their submissions, is that they are entitled to rely on the Chainbaux case which held, as summarised by the Respondent Buyers, that:

> *"….where* [a party has allowed] *a contractual term requiring a step to be taken* [to pass]*, it is necessary* [for that party] *to give a* [new] *reasonable notice making* [again] *time of the essence"*

22. Thereby the Respondent Buyers assert that, since the Appellant Sellers had *"allowed* [the Letter of Credit to remain unissued] *in excess of 2 months beyond 20th October (without any protests) to pass"*, they (the Appellant Sellers) could no longer rely on this default by the Respondent Buyers. Moreover under the judgement in Chainbaux the Appellant Buyers were then bound to give them (the Respondent Buyers) a notice of *"reasonable time"* to produce the Letter of Credit. Thus on the facts, if the Appellant Sellers' fax of 29.12.99 could be construed to be a notice in compliance with Clauses 21 and 22 of the relevant edition (1st February 1997) of GAFTA Contract 64 (which Respondent Buyers deny), the Appellant Sellers had failed to give them reasonable time, to have the Letter of Credit opened, when only giving them until *"by latest 5th January 2000"*. [Smith & Smith], in drafting the Appellant Sellers' Submissions of 20.5.02 point out that this timetable, falling in "*the long Millennium New Year holiday"* period, only effectively gave the Respondent Buyers *"one banking day"* to affect this transaction. In presenting oral submissions to us on 7th October 2003 Mr. Malik Hussain made the same point.

23. In their Submissions of 18.11.03 the Respondent Buyers fortified their argument that the Appellant Sellers could not rely on the *"breach of contract* [in the Respondent Buyers' failure to have the Letter of Credit opened] *on 20 October"* on the grounds:

> *"…it is clear that Sellers did not regard that as the date of breach* [but] *rather the parties continu*[ing] *to treat the contract as continuing. There was certainly no protest, complaint or objection by Sellers and..* [in] *… December* [1999] *they were pressing Buyers to open letter of credit (consistent only with the contract continuing)."*

24. Furthermore, in these submissions, the Respondent Buyers assert that, under the terms of our Orders of 9th October 2003, Appellant Sellers were not entitled to introduce the Bremer and Toepfer cases (which the Respondent Buyers did not identify with much accuracy!) because our Orders, in this part, were only directed to the Toprak case.

25. The Respondent Buyers, in their submissions on the issue of liability also made the following points:

(i) The Appellant Sellers' fax of 29.12.99 could not constitute a notice under the relevant GAFTA Contract 64 because under Clause 22 of it, it was not permitted to send such notices by fax.

(ii) The alleged notice of default sent by the Appellant Sellers by fax on 13.1.00 in form of a debit note could not constitute a default notice because (apart from the wrongful use again of a fax) a debit note could not be construed as a default notice.

26. On the issue of the assessment of damages the Respondent Buyers take two points. Firstly *"the party in default* [should] *be deemed to have performed the contract in the manner most advantageous to themselves and in the manner least onerous to themselves".* Accordingly, since under the terms of the Contract the quantity of Milling wheat could be varied by *"10% more or less at Buyer's option",* the Respondent Buyers were entitled to *"exercise their option to buy the minimum quantity, that is 25,200 metric tons"* – this calculation correctly resulting from 10% being deducted from the Contract quantity of wheat of 28,000 metric tons. Secondly the Respondent Buyers argue that we should disregard both the Appellant Buyers' earlier valuations for fixing the market price from [Grains] and [Agrar] and their latter valuations from [Brokerage] and [wheat] because none of these valuations are supported by *"evidence"* of *"business actually concluded".* Concerning the earlier valuations the Respondent Buyers also make the point that the [Grains] and [Agrar] valuations were based on specifications for the Millling Wheat which were different from those contained in the Contract.

27. Instead the Respondent Buyers ask us to rely on the evidence which they submit from the law firm of Christos in Contanza, who – based on certain trading figures which they annexed to their letters of advice of 26th September 2000 and 21st October 2003 – fix the market price for 13th January (or 11th - 14th January) 2000 at US$106.00 per metric ton. The Respondent Buyers also ask us to rely on the contents of a letter of 8th April 2002 from Mr. Gusev Olga who was, as a former employee of [Monaco], the broker for the Contact of August 1999. This letter is also just directed to the market price on 13th January 2000 and suggests (although not very exactly) that the price of the Milling Wheat on 13th

January 1999 was *"5 to 10 US Dollars higher"* than being claimed by the Appellant Sellers.

28. The position, therefore, is that the Respondent Buyers (in contrast to the Appellant Sellers) have not put before us any evidence on the market price of the Milling Wheat on the earlier alleged default date of 21st October 1999.

29. Before the First Tier Arbitration the Respondent Buyers produced, in the form of three witness statements, evidence that, in a meeting in Paris on 21st January 2000, the parties had reached a full and final settlement which was binding on them. Paragraphs 4.4, 4.5, 7.1 to 7.6 and 10.7 of the Award of 4th March 2002 were directed to this issue. We note, therefore, that the Respondent Buyers did not present this evidence in this Appeal or otherwise re-erect this claim. Thus this is not an issue to which we have, in any way, directed our attention in the course of this Appeal.

FINDINGS

30. The first matter which we have to decide is what was the date of default. There are three alternatives: 21st October 1999 (the day after the last date, under the terms of the Contract, for the provision of the Letter of Credit by the Respondent Buyers) 6th January 2000 (the day after the new deadline for the provision of the Letter of Credit as offered to the Respondent Buyers by the Appellant Sellers in their fax to them of 29.12.99) and 13th January 2000 (the day on which the Appellant Sellers sought to call in the default and the day on which the Respondent Buyers stated to the Appellant Sellers – in their fax of that date – that, while they were still making arrangements for the issue of

the Letter of Credit, they were not going to have it issued until they received assurances on the quality of Millling Wheat being shipped).

31. It is, perhaps, convenient at this stage to refer to the Bremer and Toepfer cases. These held that the date upon which the default should be fixed is on the last day when the contract should have been performed. Thus the Respondent Buyers, having an obligation under the Contract to have the Letter of Credit opened on or before 20th October 1999 were in default on the next day – 21st October 1999. We accept this to be the correct position in law and, therefore, if we were to hold that a new default date arose after the Respondent Buyers had failed to have opened the Letter of Credit by 5th January 2000 that default date would have been 6th January 2000.

32. The question before us, therefore, is whether the Appellant Sellers are entitled to rely on the original default of the Respondent Buyers on 21st October 1999. Following the dictum of Mr. Justice Robert Goff (as cited in paragraph 14 above) in the Toprak case we should hold that the Respondent Buyers remain bound by their original default on 21st October. On the other hand if we were to follow the follow the dictum of Mr. Justice Devlin (as cited in paragraph 15 above) in the Chainbaux case it would appear that we should come down in favour of the Respondent Buyers and hold that the Appellant Sellers had allowed time to pass from the Respondent Sellers' original default on 21st October 1999, had failed thereafter, in their fax on 29th December 1999, to give the Respondent Buyers reasonable time, during the Millennium holiday period, to have the Letter of Credit issued by 6th January 2000 and, therefore, could only rely on 13th January 2000 as the default date – being the date when the Respondent Buyers stated, in effect, that they would not be having the Letter of Credit opened.

33. There are, however, rules under the English law, which are binding upon us concerning the authority which we should follow. The Judgement of Mr. Justice Devlin was a Judgement of First Instance while the Judgement of Mr. Justice Robert Goff was a Judgement upheld in the Court of Appeal. Hence, since the Court of Appeal is a superior Court, we are bound to follow this Judgement. There are too the added factors that the Toprak case is more recent Judgement, being given in 1979 as contrasted to 1955 for the Chainbaux case, and that the Toprak case is based upon a GAFTA Default clause which, while being in an earlier GAFTA Contract with some different wording, is in its crucial words almost identical to the wording in the default clause before us.

34. We do not, however, have to rest on this point of precedence under English law. Helpfully the Respondent Buyers have put before us the full texts of both Judgements and has enabled us to study both cases. This has been of great assistance to us and enabled us to put the dictums (or dicta!) of Mr. Justice Devlin and Mr. Justice Robert Goff in proper perspective.

35. The Chainbaux case concerned the sale in 1951 of marine propulsion engines from an English manufacturing company (Harbormaster) to a French company (Chainbaux) for an onward sale to the French Government for use in the military operations which the French Government was then conducting in Indo-China. Under the terms of the contract of 18th July 1951 the Letter of Credit was to be produced within "a few weeks" of the date of the contract which Mr. Justice Devlin construed to mean within about a month and certainly by the end of August. However no Letter of Credit was forthcoming and, at the end of

August, Chainbaux explained their difficulties relating to the issue of the Letter of Credit (which, although not fully expressed, related to obtaining the necessary sterling currency at a time of strict Exchange Controls) and suggested dispensing with it and using another method of payment – a suggestion which Harbormaster rejected. Nonetheless Harbormaster continued, at the request of Chainbaux, to give more time for the issue of the Letter of Credit and, in particular, accepted letters of 21st September and 9th October from Chainbaux which stated that difficulties over obtaining sterling currency had been resolved and that the Letter of Credit was now forthcoming. Indeed Harbormaster expressly accepted in its reply of 11th October this latest timetable from Chainbaux but, on the Letter of Credit still not arriving, Harbormaster, by letter on 22nd October, "cancelled" the contract.

36. Upon these facts, while holding that Harbormaster had not given a sufficiently reasonable, or any, notice in its letter of 11th October to justify its cancellation of the contract on 22nd October, Mr. Justice Devlin nevertheless held that Harbormaster was entitled to cancel the contract because the true evidence was that, with every extension of time - which had been given to Chainbaux at its request - it was never capable of obtaining the necessary sterling currency for the issue of the Letter of Credit. It follows that the dictum of Mr. Justice Devlin in the Chainbaux case, upon which the Respondent Buyers have asked to rely, (see paragraph 15 above) was not the dictum upon which Mr. Justice Devlin relied for finding in favour of the Sellers and against the Buyers!

37. The Toprak case concerned the sale 350,000 metric tons of wheat from the Swiss subsidiary company of Continental Grain in New York to a Turkish State Company. The contract was entered into on 1st November 1974 and it was an express term of it that buyers had to

open a confirmed Letter of Credit at latest by 31st March 1975. In the period between November 1974 and March 1975 the price of wheat fell heavily – a fall in price which continued into April 1975. In the circumstances the Turkish Government wanted its State Company to withdraw from the contract but the State Company did not want to do so because if it did, in the words of Lord Denning, it would *"be landed in heavy damages".* Hence while the State Company buyer failed to open, as required by the contract, the Letter of Credit on 31st March 1975, it continued to press the Turkish Government to give the necessary exchange control permission to enable the Letter of Credit to be opened. At the same time, in communications with the sellers, it led them to believe that the Letter of Credit would shortly be opened. The sellers, therefore, waited for a month and did not put the buyer in default until 30th April 1975 when they sent a telex to that effect to the Turkish State Company.

38. Mr. Justice Robert Goff, as supported by the Court of Appeal, notwithstanding his dictum as cited in paragraph 14 above, did not hold the sellers bound by the original default date of 31st March 1975 but allowed them to rely on the later default date of 30th April (and hence give them the benefit, in fixing at later date for ascertaining the market price, of the continuing fall in the price of wheat) on the grounds that the sellers had deferred calling in the default because of the conduct of the buyer to them.

39. It follows, therefore, that Mr. Justice Robert Goff (like with Mr. Justice Devlin) did not rely on the dictum, upon which the Appellant Sellers are asking us to rely, in finding in the Toprak case in favour of the sellers and against the buyers! Nonetheless these two cases are of great assistance to us in reaching our Award.

40. Therefore, turning to the facts of the arbitration before us, it is quite plain that the Respondent Buyers were under an obligation to have the Letter of Credit opened by 20th October 1999. It is also plain that they did not do so and made no request for having that period extended. Thus it was entirely on the initiative of the Appellant Sellers that further time was given for the issue of the Letter of Credit. Moreover, in their last communication, the Respondent Buyers declared that they were not prepared to have the Letter of Credit issued unless they received assurances on the quality of the cargo arising out of alleged deficiencies in cargo quality in a different cargo which was the subject of a different contract with the Appellant Sellers. Whether the Respondent Buyers were right or wrong in complaining about the other cargo, this did not them grounds in the Contract before us to refuse to have the Letter of Credit opened.

41. It seems to us, therefore, that we can properly apply both the Chainbaux and Toprak cases to the facts before us. Firstly, similar to the Chainbaux case, the Respondent Buyers showed no real intention of having the Letter of Credit opened. They never did so and, in the end, sought to excuse themselves on grounds quite outside the parameters of the Contract before us. Secondly, as in the Toprak case, there was a clear default date (21st October 1999) which the Respondent Buyers breached. Thirdly, unlike in the Toprak case, the Respondent Buyers made no representations to the Appellant Sellers for any extensions of the original default date or provided us with any positive grounds for relieving them of that default date. On this point we cannot hold that the indulgence given to the Respondent Buyers from October to the end of December 1999 constituted any waiving by the

Appellant Buyers of their right to rely on the original default of October 1999.

42. In reaching our conclusion that the Respondent Buyers are bound to their default of 21st October 1999 we have taken account of the submissions (recorded in paragraph 25 above) of the Respondent Buyers that the Appellant Sellers' faxes of 29.12.99 and 13.1.00 were invalid as notices under GAFTA Contract 64 and cannot be relied upon because these were communications by fax contrary to Clause 22 of this GAFTA Contract which prohibits the use of fax for notices under this GAFTA Contract. The short answer is that neither of these communications constituted notices required under GAFTA Contract 64. Indeed the only specific requirement for giving a notice is contained in Clause 24(a) when the innocent party is notifying the defaulting party of its intention to sell or purchase the goods which are the subject of the defaulter's act of default. This did not arise here where the Appellant Sellers, as the innocent party, has asked us to assess their damages under Clause 24(b). Since we are holding the default date to be 21st October 1999, it is unnecessary for us to make a finding (as requested by the Respondent Buyers: see paragraph 25 (ii) above) upon whether the Appellant Sellers' sending of the debit note by fax on 13.1.00 constituted a default notice.

43. Concerning the point made by the Respondent Buyers (see paragraph 24 above) that the Appellant Sellers were not entitled, under the terms of our Orders of 9.10.03, to introduce into their submissions of 28.10.03 the Bremer and Toepfer cases, which we should therefore disregard, we point out that the Toepfer was introduced by the Appellant Sellers in their original submissions of 22.4.02 and, in any event it was not our intention, in seeking – in our Orders of 9.10.03 - further submissions on

the Toprak and Chainbaux cases to exclude the parties referring to other cases relevant to the decisions in Toprak and Chainbaux.

44. On the assessment of damages, having held that the default date was 21st October, we need only fix the market price for the Romanian Milling Wheat on that date. Upon this, as noted in paragraph 28 above, we have no evidence from the Respondent Buyers. Turning, therefore, to the evidence put forward by the Appellant Sellers we hold that we cannot rely on the earlier valuations from [Grains] of 16.9.99 (which from the fax record at top of page was sent on 12.1.00 and must have been given at a later date – the date of 16.9.99 being a month before the default date!) and [Agrar] of 10.1.00 because it appears that both of these brokers were provided with the wrong specifications for the Milling Wheat even though [Mr Francis Perrot] sought to recover to recover the position with [Grains] in June 2002. The problem, however, remains with the [Grains] valuation that there is no evidence that it is based upon actual market transactions. This leaves us with the valuation from [Mr. Albert Benson] of [Brokerage] which [Mr. Perrot] obtained in October 2003 and the other valuation which [Mr. Perrot] appears to have obtained at about the same time from [Wheat SA]. However the latter valuation is just directed to the market price on 13.1.00. Thus we are left with [Mr. Benson's] valuation. Here [Mr. Benson] does base his valuation on his firm's files of business concluded around the date of default and upon market information available to him. We believe, therefore, it is safe and proper for us to fix, as advised by [Mr. Benson], the market price on 21st October 1999 for the Romanian Milling Wheat of the specifications set out in the Contract (which [Mr. Benson] correctly records in his valuation) at US$ 104.00 per metric ton.

INTEREST

45. We now turn to the Appellant Sellers claim to be awarded interest at compound rates. Under Clause 11 of GAFTA Contract 64 and Rule 12.4 of the GAFTA Arbitration Rules No 125 we have power to award interest. We also have power to award interest under Section 49 of the Arbitration Act 1996. We believe we should do so. As found in this Award, the Appellant Sellers have wrongly been deprived of default monies since the date of default of over four years ago. Thus we hold that the Appellant Sellers are entitled to interest from the date of the date of default of 21st October 1999.

46. While we do not have express power to award compound interest at specified rest periods under either GAFTA Contract 64 or the GAFTA Arbitration Rules, we do have under Section 49 (3) of the Arbitration Act 1996 and we think it right, in accordance with their claim to be awarded compound interest, that we should award compound interest to the Appellant Sellers until the Respondent Buyers pay in full our default award against them.

47. No evidence has been put before us upon the rate of interest and rest periods which we should choose for awarding compound interest to the Appellant Sellers. We think, therefore, we should approach this calculation by taking account of the likely interest rate, which the Appellant Sellers would have had to pay commercially for borrowing monies representing the default monies, at appropriate rest periods. We, therefore, set this compound rate of interest at [ ] with quarterly rests.

COSTS

48. Upon the Appellant Sellers' claim for costs we would normally adopt the rule of 'costs following the event' but like the First Tier Arbitral Tribunal note that the Appellant Sellers have succeeded in this arbitration in obtaining damages at a much lower level (although more so on Appeal to us) than claimed by them. We think, therefore, that the First Tier Arbitral Tribunal adopted the right approach which we would like to follow. Accordingly we order that two thirds of the costs are paid by the Respondent Buyers and one third by the Appellant Sellers such costs to include the respective representative's fees and expenses but not legal fees.

ACCORDINGLY WE MAKE AND PUBLISH THIS AWARD AND DIRECT AS FOLLOWS:

(1) THAT APPELLANT SELLERS SUCCEED IN THIS APPEAL AND THAT THE AWARD OF THE FIRST TIER ARBITRAL TRIBUNAL IS VARIED AS SET OUT BELOW

(2) THAT THE RESPONDENT SELLERS FORTHWITH PAY TO THE APPELLANT BUYERS DEFAULT DAMAGES IN THE SUM OF US$[ ] (United States Dollars) TOGETHER WITH COMPOUND INTEREST THEREON AT THE RATE OF [ ], WITH QUARTERLY RESTS, FROM

21st OCTOBER 1999 UNTIL PAYMENT OF THIS AWARD

(3) THAT THE ARBITRATION COSTS OF THE FIRST TIER AWARD AND OF THIS APPEAL, INCLUDING THE COSTS OF THE PARTIES' REPRESENTATIVES AT THE APPEAL HEARING, ARE, AS TO TWO THIRDS, FOR THE ACCOUNT OF THE RESPONDENT BUYERS AND AS TO ONE THIRD TO THE ACCOUNT OF THE APPELLANT SELLERS.

MADE AND PUBLISHED IN LONDON, ENGLAND, BEING THE SEAT OF THIS ARBITRATION.

[signed]

[February 2004]