GAFTA CASE NUMBER: 00-000

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 :-

[ZURICH INTERNATIONAL AG]
Zurich, Switzerland

CLAIMANT BUYERS

-AND-

[MOSCOW EXPORTKHLEB]
Moscow, Russia

RESPONDENT SELLERS

PRELIMINARY AWARD

CLAIM

1. In this arbitration the Claimant Buyers are claiming the sum of US$878,000.00 plus compound interest as default damages on a Contract for the sale of 30,000 Russian Feed Wheat.

SEAT OF ARBITRATION AND GOVERNING LAW

2. Subject to the challenge of the Respondent Sellers that we do not have jurisdiction, the juridical seat of this arbitration is England and the English Arbitration Act 1996 governs the procedural law relating to it.

PARTIES

3. The principal person, in this matter, who acted on behalf of the Claimant Buyers, Zurich International AG ("Zurich") was [Rosa Bern] ("[Ms Bern]"). The principal person who acted on behalf of the Respondent Sellers, Moscow Exportkhleb ("Moscow Export") was [Fyodor Orlov] ("Mr Orlov"). Also, acting on behalf of the Respondent Sellers, were [Nikolay Polonsty], the President of the Respondent Sellers, ("[Mr Polonsty]") and [Semyon Anastasy], the Departmental Director of [Mr Orlov] ("[Mr Anastasy]").

SUBMISSIONS

4. The only submissions placed before us have been the Claim Submissions of the Claimant Buyers. Attached to these Claim Submissions are a bundle of numbered documents starting with a signed statement of [Ms Bern] and ending with extracts from Chitty on Contracts, Benjamin's Sale of Goods and a copy of the Court of Appeal Decision of May 1987 in Pagnan Spa v Feed Products Ltd. When, therefore, referring to the Claimant Buyer's Submissions we will refer to them as **"Claim Subs"** and when referring to the documents attached thereto we will refer them to **"DOCS [p]"**. Under what the Claimant Buyers describe as an automatic updating under the Zurich computer

system, the dates on a number of the documents reflect the date when they were printed as opposed to when they were originally issued. Consequently the Claimant Buyers have manually corrected the dates in these documents. When, therefore, referring to them we have relied upon the manually corrected dates as placed before us.

JURISDICTION: RESPONDENT SELLERS

5. It is the Respondent Sellers' case that they never entered into a *"legal contract"* **(DOCS p 36)** and that they cannot *"accept any legal responsibilities"* for any *"business"* **(DOCS p 34)** which took place between the Parties in July 2003. Following the appointment of [Ms June Smith] as Arbitrator by the Claimant Buyers, the Respondent Sellers appointed [Mr Henry Able] as Arbitrator but strictly on the basis that *"this appointment* [was] *entirely without prejudice to* [their] *contention that no…contract…ever came into existence and accordingly the Arbitrators have no jurisdiction to hear the matter".* **(DOCS p 43)**.

6. Consequently after the Claimant Buyers' submissions of 8th March 2004, were served upon them, the Respondent Sellers stated, in a letter dated 12th April 2004, to the Director General of GAFTA, that they wished to *"take no part whatsoever in this alleged arbitration because at no time was any arbitration agreement made between the parties whether orally or in writing".* While acknowledging the right of the Respondent Sellers to refuse to take part in this arbitration, the Tribunal, in a letter to the Parties dated 16th April 2004, invited the Respondent Sellers nonetheless to submit written submissions on the issue of jurisdiction – such submissions not be treated as compromising their assertion that the Tribunal has no jurisdiction to conduct this arbitration.

7. In reply the Respondent Sellers, while expressing *"great respect for* [GAFTA's] *esteemed organisation",* declined to take up the *"kind offer to serve any formal submissions "* (**Letter dated 29th April 2004 to the Director General of GAFTA**).

8. We are, therefore, only able to decide the jurisdiction issue on the submissions and documents put before us by the Claimant Buyers. The Tribunal has decided, however, should it find it has jurisdiction, to give another opportunity to the Respondent Sellers to participate in this arbitration before the Tribunal makes an Award on the merits of the dispute between the Parties.

OUTLINE OF FACTS

9. According to [Ms Bern] the first contact, relating to this sale of the 30,000 metric ton of Russian Feed Wheat, was made by [Mr Orlov] in a telephone call on 30th June 2003. In that telephone call, conducted in the Russian language, [Mr Orlov] enquired whether the Claimant Buyers were interested in entering into a Contract with the Respondent Sellers for the purchase of 30,000 metric tons of Russian Feed Wheat for shipment in August or September 2003 at the price of US$127.00 per metric ton. The contract should be a CIFFO Contract for delivery of the grain to Italy or to other destinations such as Greece and Israel (**Para 5: Statement of [Rosa Bern] of 2.3.04: DOCS p 2)**.

10. [Ms Bern] goes on to state that this proposed sale of Russian Feed Wheat was again discussed (presumably over the telephone and again in Russian language) on 1st July and agreement was reached on the quantity and price of the grain, the cargo vessel sizes and the shipment period. However [Ms Bern] admits that she did not, in this conversation,

discuss the “NOR/laytime terms” because she considered them as “relatively minor terms which could be discussed and agreed later” (**Para 6 ibid**). However on the same day [Ms Bern] sent to [Mr Orlov] a telefax in these terms:-

“Dear Albert,

Referring to our today’s conversation we would like to confirm as follows:

Commodity: 30.000mt Feed Wheat
5% m.o.l. in Seller’s option
Russian origin,

Quality: Sound, Loyal, Merchantable quality
Free from foreign smell and alive insects
Free from toxic matters

Moisture max. 14%
Test weight min. 72/73kg/hl
Admixture max. 2,0%
Other grains max. 3% (no triticale)

Quality and weight final at loading as per certificate issued by a first class superintendent in Seller’s option. Buyers have the right to send their representatives at loading for their account.

Shipment; *September - October 2003 in Sellers’ option but min. 10.000 mt 5% to be shipped in october.*

Price and delivery conditions:

CIF FO Italy E.C. $125,00/mt

CIF FO Italy W.C. $126,00/mt

CIF FO Greece $121,00/mt

CIF FO Isreal $126,00/mt

All at Buyer's option but destination Greece and Israel max. 12.000mt 5% together. The option to be declared by latest 20.08.2003.

Payment: *Cash against shipping document within 5 banking days after receipt of the shipping dox.*

Discharge terms:
in case of vessel of abt 3000mt: 13000 WWDSSHEXIIU,
in case of vessel of abt 5000mt: 2000 WWDSSHEXIIU,
in case of vessel of abt 10000mt: 3000 WWDSSHEXIIU.
Other terms and conditions: *as per GAFTA 48.*
Arbitration: *GAFTA 125, arbitration place in London.*

The Contract will follow.

Best regards,
Zurich International AG" (**DOCS pp 4-5**)

11. On the next day (2nd July 2003) [Mr Orlov] sent a telefax letter thanking [Ms Bern] for confirming the "*buying 30,000mt Feed Wheat Russian origin*" and asking her to include in the Contract the *"transport conditions"* which he sent in printed form with his fax letter and which

covered a number of matters relating to the transport of the cargo including the nomination of the *"carriers"* of the goods, the right of the Buyers *"to require the vessel to discharge at more than one berth within the same port"*, the Notice of Readiness, the laytime period, the rates of discharge of the cargo and so forth (**DOCS pp 6-8**).

12. In the meantime, also on 2nd July 2003, [Ms Bern] sent the Contract to the Respondent Sellers in the following terms:-

> *"We herewith confirm the following purchase Contract:*
>
> *Contract date:*
> *July 2nd, 2003*
>
> *Contract no.:*
> *478784.*
> *Please refer to this number in all correspondence to enable immediate identification.*
>
> *Buyers:*
> *ZURICH INTERNATIONAL AG.*
> *ZURICH.*
>
> *Sellers:*
> *MOSCOW EXPORTKHLEB*
> *MOSCOW*
>
> *Commodity:*
> *FEED WHEAT.*

Orgin:
RUSSIAN.

Quality:
Sound, Loyal, Merchantable

*****

Quantity:
About 30.000 metric tons.
5% more or less in Sellers' option and at contractprice.
Loaded weight final as per certificate(s) issued by a first class superintendent, at Sellers' option.
Buyers have the right to send their representatives at loading for their account.

Shipment:
Between 01-09-2003 and 31-10-2003, both dates inclusive, in Buyers' option, but minimum 10.000 metric tons 5% more or less to be shipped in October 2003.
In case destination Greece and / or Israel: shipment in vessels of 3.000 metric tons 5% more or less.
In case destination Italy: shipments in vessels of 3.000 metric tons 5% more or less and / or 5.000 metric tons 5% more or less and / or 10.000 metric tons 5% more or less.

Packing:
In bulk.

Price:
USD 125,00 per metric ton

C.I.F. FREE OUT 1/ 2 berth(s), EAST COAST ITALY.

Or

USD 126,00 per metric ton.

C.I.F. FREE OUT 1/ 2 berth(s), WEST COAST ITALY or ISRAEL.

Or

USD 121,00 per metric ton.

C.I.F. FREE OUT 1/ 2 berth(s), GREECE.

All in transit.

All in Buyers' option but destination Greece and Israel max. 12.000 metric ton, 5% together.

The option to be declared by latest 20-08-2003.

Payment:

Net cash within five banking days after receipt of the shipping documents.

Documents to presented:

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Discharge conditions:

- *In case of vessel of about 3.000 metric tons:*
  Buyers guarantee a min. discharge-rate of 1.300 metric tons per weather working day of 24 consecutive hours, Saturdays, Sundays and Holidays excluded, even if used.
- *In case of vessel of about 5.000 metric tons:*
  Buyers guarantee a min. discharge-rate of 2.000 metric tons per weather working day of 24 consecutive hours, Saturdays, Sundays and Holidays excluded, even if used.

- *In case of vessel of about 10.000 metric tons:*

  Buyers guarantee a min. discharge-rate of 3.000 metric tons per weather working day of 24 consecutive hours, Saturdays, Sundays and Holidays excluded, even if used.

  Time between 17:00 hrs on Fridays, or (a) day proceeding (a) local/legal holiday(s) till 08:00 hrs on Mondays, or the day after (a) holiday(s) not to count, even if used.

  Notice of Readiness to be given by the vessel during local office hours on working days between 09.00 and 17.00 hrs and time to count next working day 08.00 hrs a.m. after Notice of Readiness tendered.

Demurrage rate/despatch rate as per Charter-party.

Despatch always half demurrage rate.
In case of time – charter, demurrage-rate to be equal to vessels daily-hire, otherwise as per above.

Other conditions:
All other terms and conditions not conflicting with the above as per G.A.F.T.A. no. 48.

All the above terms, conditions and rules contained in form No. 48 of the G.A.F.T.A. (of which the Parties admit that they have knowledge and notice) apply to this transaction, and the details above given shall be taken as having been written into such form in the appropriate places.

Arbitration clause:

Any dispute arising out of or under this Contract shall be settled by arbitration in accordance with the Arbitration Rules No. 125, of the Grain and Feed Trade Association, in the edition current at the date of this Contract, such Rules forming part of this Contract and of which both parties hereto shall be deemed to be cognizant. Arbitration to take place in LONDON.

The validity of this Contract will be unaffected by non-return of the counter confirmation duly signed by yourselves.

For the Buyers: *For the Sellers:*

ZURICH INTERNATIONAL AG, ZURICH *MOSCOW EXPORTKHLEB, MOSCOW"*

(**DOCS pp 9-11**)

13. At that stage, therefore, [Ms Bern] had not included into the Contract the *"Transport Conditions"* as sent to her on the same date by [Mr Orlov].

14. The next communication was from [Mr Orlov] to [Ms Bern] on 9th July 2003 in the form of a telefax which carried the heading

"Re:contract 478784 dd.July 02,2003
30 000 mt of Russian Feed Wheat"

15. In this fax letter of 9th July 2003 [Mr Orlov] asked for a number of changes to be inserted into the Contract, relating to the *"shipment"*, *"discharge conditions"* and "*laytime"* terms although most of the proposed changes were quite small (viz changing the percentage tolerance figures in the quantities of wheat to be delivered from 5% to 10%). He did propose, however, some more significant changes over the 'laytime' terms (**DOCS pp 12-13**).

16. Apparently because she was away travelling, [Ms Bern] did not respond to these requests for changing the terms of the Contract until she sent an email to the Respondent Sellers on the 11th July 2003. In that email [Ms Bern] accepted all of the Respondent Sellers' proposed revisions (insofar as they were revisions) except those relating to laytime. (**DOCS p 14**)

17. At about this time (and it would seem to be before [Ms Bern] sent her email of 11th July), there had been discussions over the transport conditions with [Mr Orlov], then with his superior, [Mr Anastasy] and finally with the President of the Respondent Sellers [Mr Polonsty]. In these discussions it is the recollection of [Ms Bern] that [Mr Orlov] accepted that a Contract had been agreed on 1st July and that they

were only having discussions *"on details"* relating to it. (**Para 10: Statement of [Rosa Bern] of 2.3.04: DOCS p 3**)

18. Still writing under the heading of:

"Re:contract 478784 dd.July 02,2003
30 000 mt of Russian Feed Wheat"

[Mr Orlov] wrote on 14th July 2003 to [Ms Bern] further pressing her to set out the laytime period according to the wording which the Respondent Sellers had sent to the Appellant Buyers. The response of [Ms Bern], in a email of the same date, was

"unfortunately we insist on our terms we sent you
on Friday and can not acccept your suggestion"

(**DOCS pp 15-16**)

She followed this up with another email on 16th July 2003 in which she stated she understood that the Respondent Sellers had

"accepted the final version of our contract (see
my email 14.07)" (**DOCS p 17**)

When [Mr Orlov] sent another email to [Ms Bern] on 17th July 2003, stating that *"unfortunately we can not accept the final version of our contract"*, [Ms Bern] replied by stating

> *"we don't agree with the content of your email, the contract has been included and we were only finalising details".* (**DOCS p 18**)

19. In a letter attached to an email of 17th July [Mr Orlov] recorded that agreement had not been reached on *"the conditions of laytime calculation"* and complained that the *"switching to your terms means additional sufficient risk for us".* (**DOCS p 19**) The next letter was sent on 21st July 2003 (but mis-dated, as the Claimant Buyers suggest, 14th July 2000) from [Mr Anastasy] who asserted that the Respondent Sellers had not been able "*to finalise the contract and sign its original… due to your unwillingness to compromise on the transport terms".* Thus [Mr Anastasy] went on to state

> "*We consider our agreement for supply of 30,000mt of Russian Feed Wheat not finalised* "
> (**DOCS p 21**)

20. By this time an impasse had been reached between the Parties. The Respondent Sellers asserting that *"we consider our business null and void due to your unwillingness to compromise on the transport terms"* (**DOC p 24**) and the Claimant Buyers asserting that *"we confirm once more that this contract remains valid for us"* (**DOCS p 25**)

21. In a fax letter of 29th July 2003 [Mr Polonsty], the President of the Respondent Sellers stated that the reason the negotiations could not be finalised and the Contract signed was because the Parties had *"failed to agree on the essential term directly affecting price – laytime calculation"*. [Mr Polonsty] then took the point, for the first time, that the "*Arbitration*

Clause and GAFTA Reference Clause" were also matters which had to be negotiated before final agreement could have been reached. In making this point [Mr Polonsty] stated

> *"You are fully aware of the fact that we would not have accepted London Arbitration, because the goods may cross the border only in strict compliance with Russian customs and financial regulations. As you continuously refused to agree even on the laytime question, we did not start negotiating the above items".*

[Mr Polonsty] also took the point in this letter, referring to the Vienna Sales Convention of 1980, that it was *"world wide practice"* that *"the contract is concluded only when an unconditional agreement on essential terms is reached which was unfortunately not the case"* (**DOCS p 26**).

22. In a further letter of 1st August 2003, [Mr Polonsty] took, again for the first time on behalf of the Respondent Sellers, the further point that *"all contracts"* for goods being imported and exported could, under Russian law, only be *"considered valid"* when properly signed and stamped. If not so prepared, the Contracts would not be accepted by Russian custom authorities and banks and therefore *"no-one in Russia can commence shipments and loading"* without the contracts being in this form (**DOCS p 32**).

23. On the Respondent Sellers rejecting the options put to them, under the Contract, the Claimant Buyers asserted that the Respondent Sellers had repudiated the Contract and were liable for damages in default as

set out in three invoices which the Claimant Sellers attached to their letter of 29th August. (**DOCS pp 38-41**)

CLAIMANT'S SUBMISSIONS

24. Having referred to the facts contained in the documents attached to their submissions, the Claimant Buyers assert that the test which we should apply, in deciding whether the Parties had entered into a valid and binding Contract, was an objective test. (**Claim subs para 30**) If the Parties had, in outward appearance, agreed the cardinal terms of a Contract then that Contract was binding even though other terms, outside the centre of the Contract, had yet to be agreed. (**see Claim subs paras 30 and 31 and Chitty on Contracts paras 2-104 and 2-105 DOCS pp 47 and 48**).

25. In asking us to conclude that Parties had agreed, on 1st July 2003, the essential terms of the Contract for the sale of the 30,000 metric tons of Russian Feed Wheat, the Claimant Buyers refer to the extent of the terms which were agreed between the Parties and which remained agreed through all the subsequent negotiations over transport conditions. (viz the identity of the goods, the quantity of the goods [including almost all the percentage tolerances on quantity], the price of the goods, the quality of the goods, the bulk of the shipment terms etc).

26. The Claimant Buyers also refer to the conduct of the Respondent Sellers in the subsequent correspondence in which they were effectively 'confirming' the Contract and only entering into negotiations over its 'details'. Thus the Claimant Buyers assert that "*the parties had agreed on 1st July 2003 to all of the essential terms*" of the Contract (**Claim**

subs para 38) and thereafter remain bound by them. The Claimant Buyers further point out that although the GAFTA Arbitration Clause, for an arbitration taking place in London, was in the contractual documents from the outset (see fax letter 1st July 2003 and draft Contract of 2nd July 2003. (**DOCS pp 4-5 and 9-11**), the first time that an objection was taken to GAFTA Arbitration Clause was in [Mr Polonsty]'s letter of 29th July 2003 (**DOCS p 26**).

27. In asking us to find that we do have jurisdiction under the GAFTA Arbitration Clause set out in the Contract of 2nd July 2003, the Claimant Buyers place particular reliance on the judgements of Mr Justice Bingham (as he then was) and of Lord Justice Lloyd in the case of Pagnan Spa v Feed Products Ltd (1987) 2 Lloyd's Reports page 601. In reference to the parties in the Pagnan case not having reached agreement on the loading rate, demurrage and despatch and carrying charges, Mr Justice Bingham stated

> *"I accept that these are terms of economic significance to buyers, and to these buyers. I accept that it is usual for parties to reach express agreement on them. I accept that … the buyers and the sellers expected terms to be put forward for agreement…I do not, however, accept that either party intended express agreement on these terms to be a pre-condition of any concluded agreement. I think the parties regarded these as relatively minor details which could be sorted out without difficulty once a bargain had been struck…I conclude that this is a case in which the parties did mutually intend to bind themselves on the terms agreed… leaving*

> *certain subsidiary and legally inessential terms to be settled later"* (**See page 613 second column: DOCS p 58**).

28. It is on this basis that the Claimant Buyers ask us to conclude that the Parties, in this case, had agreed upon the essential terms of the Contract and were only negotiating on minor terms.

TRIBUNAL'S FINDINGS UPON JURISDICTION

29. As earlier noted, apart from the Respondent Sellers' letters to GAFTA of 12th and 29th April 2004, the only submissions before us on jurisdiction are those put before us by the Claimant Buyers (**paras 6-8 above**). In doing so they rightly drew our attention to Section 30 of the English Arbitration Act 1996 and Paragraph 8.1 of the current edition of the GAFTA Arbitration Rules – each of which empower us to rule upon our own jurisdiction.

30. Unfortunately the Claimant Buyers gave us no assistance upon the essential question of under what law we should decide whether the Parties had entered into a binding contract. This is of great importance in this Arbitration. If we were to apply Russian law on this issue it would appear from the Respondent Sellers' letter of 1st August 2003 (**DOCS p 32**) that we would have to conclude there was no valid binding contract because there was no contract entered into between the Parties which

met the requirements under Russian law of it being properly signed and stamped. On the other hand if we were to decide that we should apply English law to this issue – and accept that we were bound by the Pagnan case – we would have to conclude there was a valid binding contract upon which the Claimant Buyers were entitled to succeed in their claim against the Respondent Sellers.

31. Thus, in the absence of assistance on this essential issue, we must take our own course in deciding it. The first matter is whether we have any jurisdiction at all on the issue of jurisdiction. For this purpose we cannot rely on the terms of a contract which one party denies is properly constituted and valid. However, notwithstanding the Contract may be void, we are entitled to sever the Arbitration Clause from the rest of the Contract. This is well established in Article 16 (1) of the Model Law and, insofar as we can apply it, in Section 7 of the English Arbitration Act 1996.

32. In the Contract before us the Arbitration Clause plainly states that the Arbitration is to be conducted under the current GAFTA Arbitration Rules and to take place in London (**see paragraph 12 above at top of p 11**). No objection whatever was taken by the Respondent Sellers to the terms of this Arbitration Clause until a very late stage when, on 29th July 2003, they were seeking to get out of the Contract (**DOCS p26**). We are quite clear, therefore, that the Arbitration Clause contained in the Contract, as sent to the Respondent Sellers by the Claimant Buyers on 2nd July 2003, was a Clause upon which the Parties, from the outset, were agreed. It is also clear that we can sever this Arbitration Clause from the rest of the Contract.

33. It therefore follows that we have jurisdiction to conduct this Arbitration under the GAFTA Arbitration Rules and English procedural law pursuant to the English Arbitration Act 1996. Thus our duty is to decide, under English procedural law, what is the substantive law which governs our decision upon whether there is a valid and binding agreement between the Parties.

34. At one time, under English procedural law, the proper law of a contract was ascertained by examining the precedents created under the English Common Law. This has now changed. The Contracts (Applicable Law) Act 1990 adopted almost in its entirety the Rome Convention on the Law Applicable to Contractual Obligations (1980). Thus, with a few small exceptions, the Rome Convention has been enacted into English Statutory Law. Strictly applied the Rome Convention is directed to ascertaining the proper law in concluded contracts. In this case we have to apply the correct proper law to ascertain whether or not a contract has been concluded. We believe, however, that (although not strictly binding upon us) the principles contained in the Rome Convention can safely be applied to contracts which have not been concluded. By doing so we will also be generally following the principles under English Common Law for ascertaining the proper law of a contract.

35. Under the Rome Convention the first means of ascertaining the proper law is by identifying whether the Parties themselves have chosen the proper law under which they wish the contract to be governed. For this purpose the test is contained in Article 3 (1) of the Rome Convention

> *"A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with*

> *reasonable certainty by the terms of the contract or the circumstances of the case".*

If the party's choice of the proper law cannot be ascertained under Article 3 (1), then Article 4 (1) of the Rome Convention comes into play.

> *"To the extent that the law applicable to the contract has not been chosen [by the parties under Article 3] the contract shall be governed by the law of the country with which it is most closely connected".*

The remaining paragraphs under Article 4 give further assistance in setting out the criteria for concluding that a Contract is *"most closely connected"* to one country.

36. If we were to apply Article 4 (1) we would almost certainly rule that we should decide the issue whether there was a valid contract under Russian substantive law. This dispute relates to Russian Wheat, grown in Russia and being sold from Russia by a foreign Trade Joint-Stock Company whose principal office is in Moscow. Our first duty, however, is to ascertain whether the Parties have chosen, pursuant to Article 3(1), the proper law which was to govern the Contract.

37. From the outset the Claimant Buyers asserted that GAFTA Contract No. 48 should be incorporated into the Contract. If incorporated, it is quite plain under Clause 27 (the 'Domicile Clause') of the current GAFTA Contract No. 48, that the Contract would be wholly bound by English Law. Although the Respondent Sellers were negotiating with the Claimant Buyers upon the shipment, discharge and laytime terms they never sought to negotiate or challenge the incorporation of the terms of

the GAFTA Contract No. 48 into the Contract until 29th July when, as earlier noted, they were seeking to get out of the Contract altogether. Specifically we note that in his letters of 9th and 14th July 2003, [Mr Orlov], expressly requested that as soon as the Claimant Buyers could agree the revision sought over the shipping terms, they should "*send … [the] … revised Contract*" (**DOCS pp13 and 15**). It seems, therefore, to us that, beyond any doubt, the Respondent Sellers were accepting, at the time this Contract was being set up, that the governing law of it should be English Law under GAFTA Contract No. 48. In these circumstances **WE FIND** that we should be bound by English substantive law in deciding whether or not there was a binding contract between the Parties.

THE LAW

38. In this regard it seems to us that the Claimant Buyers have correctly put before us the English law, upon which we should decide the issue of jurisdiction. As stated by Mr Justice Bingham in the Pagnan case the test under English law is whether the parties intended to, and did, make a binding contract: "*…the Court's task remains essentially the same: to discern and give effect to the objective intentions of the parties* (**See page 611 second column**: **DOCS p 56**). To further quote from the judgement of Mr Justice Bingham in the Pagnan case, the words of Lord Denning in Storer v Manchester City Council (1974) 1 WLR 1403 are of assistance:-

> *"In contracts you do not look at the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out*

> *of a contract by saying 'I do not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough."* (**See page 610 second column: DOCS p 55**)

39. Following through on the Pagnan case we believe that we should apply two tests on the facts before us. Firstly had the Parties agreed the core of the Contract for the sale of the 30,000 metric tons of Russian Feed Wheat? Like Lord Justice Lloyd in the Court of Appeal in the Pagnan case we avoid the primary test of whether the Parties had agreed the *"essential terms"* for the sale of this Russian Feed Wheat because *"essential"* to one Party may not be *"essential"* to the other Party. Secondly were the Parties themselves treating the terms, as agreed between them, as constituting an agreement under which they intended to be bound? -

40. While the Claimant Buyers focus principally upon the level of agreement between the Parties on 1st July 2003 – their case being that the principal terms of the Contract were agreed over the telephone on 1st July and confirmed the same day by fax just leaving over the NOR/laytime terms to by discussed later "as relatively minor terms" (**DOCS pp 2 and 4-5**). However we think we should follow through on the negotiations between the Parties, up to 11th July 2003. This is important because, according to the email from [Rosa Bern] of 11th July 2003, it appears that the Parties had reached agreement on all the terms of the Contract except over the period of laytime – the contention of the Claimant Buyers being that laytime should commence (holidays aside) at 5pm on Friday and the Respondent Sellers contending that laytime should commence at 12

noon on Saturday with both Parties agreeing that the period of laytime then went to 8am on Monday. We have to conclude, therefore, that this difference between the Parties was minor. It did not go to price. It did not go to quantity and cannot be treated as a major item in calculating demurrage. The Parties, therefore, had achieved, by 11th July 2003, a higher level of agreement than had been reached in the Pagnan Case where the parties had not agreed upon the loading rate, demurrage and despatch and carrying charges. (**See p 623 first column DOCS p 58**). We could hold that the Parties had reached on 1st July a sufficient level of agreement (on the nature of the grain, its price, the cargo vessel sizes and shipment period) for us to apply the Pagnan case (**see above**) for them to be bound by the Contract but it is not necessary for us to do so when they had, 10 days later, reached a level of agreement well beyond that which had been agreed in the Pagnan case.

41. It is also, of significance that from 2nd July 2003 onwards, the Respondent Sellers were effectively acknowledging that a Contract existed - a Contract that they were asking the Claimant Buyers to send to them in revised form. While, therefore, we could hold that the Parties had agreed, from the outset, the essential terms of this Contract we think it sounder to rely on the level of agreement reached on 11th July. Accordingly **WE FIND** the Parties did conclude a Contract that was binding upon both of them.

42. Following the publication of this Award on Jurisdiction, we give the Respondent Sellers an opportunity, if they wish to take it up, to make representations on the substantive claim against them - which they can continue to do without prejudice to their denial that we have jurisdiction in this arbitration. We think, therefore, they should be given 21 days to make these representations and thereafter the Claimant Buyers should

be given 14 days to reply to them. If the Respondent Sellers do not take up this opportunity it is our intention (unless the Claimant Buyers seek to put further submissions before us and we agree to them doing so with a right of reply to the Respondent Sellers) to proceed forthwith to issue our Award on the substantive issues in this Arbitration.

ACCORDINGLY, IN THIS OUR PRELIMINARY AWARD, WE FIND AND DIRECT:-

(1) THAT WE HAVE JURISDICTION TO DECIDE THE SUBSTANTIVE ISSUES IN THIS ARBITRATION;

(2) THAT THE RESPONDENT SELLERS HAVE 21 DAYS FROM THE PUBLICATION OF THIS AWARD TO MAKE REPRESENTATIONS ON THE CLAIMANT BUYERS' SUBSTANTIVE CLAIMS AGAINST THEM;

(3) THAT THE CLAIMANT BUYERS HAVE 14 DAYS THEREAFTER TO REPLY TO THE ABOVE REPRESENTATIONS, IF MADE;

(4) THAT ALL ISSUES ON COSTS ARE RESERVED TO OUR FINAL AWARD.

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

[signed and dated October 2004]