IN THE MATTER OF AN APPOINTMENT BY THE PRESIDENT OF THE LONDON COURT OF INTERNATIONAL ARBITRATION

IN THE MATTER OF THE ARBITRATION ACT 1996

IN THE MATTER OF A DISPUTE

B E T W E E N:-

ALPHA EXPRESS INTERNATIONAL (UK) LIMITED

(now DELTA AEI (UK) LIMITED)

Claimant

- and -

UNITY AIR EXPRESS AB

Respondent

A W A R D

Appointment

1. Pursuant to an agreement between the Claimant and the Respondent, dated February 1999, and pursuant to the parties being unable to agree between themselves upon the appointment of a Sole Arbitrator, I was appointed, on 19th

March 2000, by the President of the London Court of International Arbitration (the "LCIA") as Sole Arbitrator in this dispute between the parties.

Terms of Conduct of Arbitration

2. It has been agreed between myself, as Arbitrator, and the Solicitors for the Claimant, Messrs Mushroom, and the Solicitors for the Respondent, Messrs Rustie & Co that I should conduct this arbitration under my Terms of Appointment, as signed, on 11th May 2000, respectively by Messrs Mushroom on behalf of the Claimant and Messrs Rustie & Co on behalf of the Respondent.

3. As well as agreeing that I should conduct this arbitration in accordance with my said Terms of Appointment, it was agreed, at a meeting held in my Chambers on 11th May 2000, that this arbitration should also be conducted under the terms of my Orders for Directions - such Orders being subsequently reduced into writing and served on the Solicitors for each of the parties.

4. Since making my Orders for Directions on 11th May, the time table for the conduct of this arbitration, and for making my Award, has been extended. I also gave leave to the Respondent to serve further evidence which it did in the form of two further witness statements one being the second witness statement of the Respondent's witness Mr Jan Jansen and the other being an expert opinion from

the Respondent's witness Mr Henrik J. Bardach which were served respectively on 6th and 9th October 2000. Other than these changes, my Orders for Directions of 11th May 2000 have remained in place and still govern the conduct of this arbitration.

5. The parties agreed, rightly in my view, that this arbitration should be conducted on a 'documents only' basis. Almost without exception all contact between the parties was either made, or confirmed, in writing - in exchanges of e-mails and faxes taking place between them – and it has been possible for me, without difficulty, to conduct this arbitration without oral evidence being put before me. It has also been possible for me to conduct this arbitration without oral submissions being made to me by Counsel or Solicitors on behalf of the parties or indeed by the parties themselves. I did lay aside a day in January to receive oral submissions if I thought it necessary to do so. I decided, however, it was not necessary and this appointment in January was vacated.

6. It will be noted that I am referring to the parties by reference to "Claimant" and "Respondent". Although these were the terms I used in my Terms of Appointment (as amended in manuscript concerning the Respondent) and in my Orders for Directions, I note both the Claimant and the Respondent, in submitting documents to me, have, on a number of occasions, referred to, Unity Air Express AB, as the Defendant. I should, therefore, make it plain that throughout this

Award, when I am referring to the Respondent, I am referring to Unity Air Express AB.

7. The understandable and sad difficulty that has faced the Respondent, throughout the conduct of this arbitration, has been the absence of one of their senior employees and key witness, Til Hanff ("Mr. Hanff") In a sudden and unexpected death Mr. Hanff died of a heart attack in May 1996 shortly after the transaction, which is the subject of this arbitration, had taken place. Although I fully understand the concern of the senior management of the Respondent, in not having Mr. Hanff available to give evidence in this arbitration, I would like to assure them that I have done all I can, during the conduct of this arbitration, not to put them at a disadvantage. I have, for example, discounted altogether the allegation by the Claimant's witness, Mr. Colin Thynne ("Mr.Thynne"), that Mr Hanff had later told him (in a telephone conversation of about 11th March) that, as well as putting the instruction in the BA Airways Bill of 29th February that the shipment of telephones should be held at Riyadh Airport, he (Mr. Hanff) had, at the same time, sent an e-mail to the Claimant's agent in Saudi Arabia, to confirm this instruction which Mr. Thynne states that he gave to him. I have discounted this evidence not because I disbelieve Mr. Thynne but because, taking into account the Respondent has been unable to serve a statement from Mr. Hanff, I believe it would be wrong to accept this evidence without independent

corroboration of it. Since, therefore, this evidence is uncorroborated I have discounted it.

8. Before I pass from commenting upon the terms of the conduct of this arbitration I should like to express special thanks to Solicitors and Counsel for all the help which they have given to me. In doing so I should like to record particular appreciation to Ms Flora McBean, the partner at Messrs Mushroom, who has been responsible for the conduct of the Claimant's case, and to Mr Igor Rustie of Messrs Rustie & Co who has been responsible for the conduct of the Respondent's case. I would also like to express special thanks to Counsel. Mr Allen Cool, of Counsel, appears to have been instructed by the Claimant throughout this arbitration - as he appears also to have been instructed for the Claimant throughout the legal proceedings in the High Court between HTI Europe Ltd and the Claimant. I have greatly benefited from his careful work, throughout the time he has acted for the Claimant, and express most grateful thanks to him for the drafting, no doubt with the excellent assistance of Ms McBean and others at Mushroom, of the Claimant's Final Submissions. I am also grateful to the Counsel who acted in this arbitration on behalf of the Respondent. It was Mr Alfred Hyphen of Counsel who drafted the Respondent's Defence, and it was Miss Karen Brittle, doubtless with the good assistance of Mr Igor Rustie and others at Rustie & Co, who drafted the Respondent's Final Submissions. While, I confess, I did find certain deficiencies in the drafting of the Respondent's

Defence, the Respondent overcame all of those deficiencies in the quite excellent drafting of its Final Submissions. As with the Claimant's Final Submissions, I have been greatly assisted by the Respondent's Final Submissions.

Parties

9. There are a number of parties who, one way or another, were involved in the contractual arrangements out of which this dispute between the Claimant and the Respondent arose. Firstly there is HTI Europe Ltd who was the seller and the shipper of the consignment of mobile telephones, which formed the subject matter of this dispute. At the material time this company appears to have traded under the name of High Tech International and was a subsidiary company of High Tech International Ltd which operated from Hong Kong. Then in the 'HTI family' there is High Tech International Middle East Ltd which is described as being a Member of the Swell Holdings Group and which (although trading under the name of International Tech International or HTI) was, on the evidence put before me, a separate company from either entities of High Tech International in England or Hong Kong. I will, therefore, refer, throughout this Award, to the three High Tech International companies respectively as "HTI Europe", "HTI Hong Kong" and "HTI Middle East".

10. Next, in the chronology of events, is the buyer of the mobile telephones, Sing la Sing Co Ltd, located in Riyadh in the Kingdom of Saudi Arabia. In the papers before me various abbreviations have been used for this party, like for example "SLS". I will, however, refer to this party, throughout this Award, as "Sing". In the order of events, the next to appear are the Claimant and the Respondent. In the transaction, the subject of this dispute, the Claimant and the Respondent acted as freight forwarders - the contractual arrangements between them being that the Respondent acted as the Claimant's agent as the freight forwarder for the shipment of the mobile telephones, the subject of this dispute, from Sweden to Saudi Arabia. At the time both of these parties carried similar names and indeed were and (as I am instructed) still are sister companies in the same group of companies. Since the Claimant has subsequently changed its name, the name "Delta" or "AEI" have been used in the pleadings and statements put before me. I have, however, found this confusing, because at the material time and in all the documents created at the material time, the Claimant bore the name "Alpha Express International" or abbreviations of it. Throughout this Award, therefore, I will refer to the Claimant as "Alpha Express". Concerning the Respondent, Unity Air Express AB, the most usual reference made to it has been "Unity". Since this was the name it used and (as I understand it) still does, I am happy, throughout this Award, to refer to the Respondent as "Unity".

11. I now turn to the two carriers: Kuwait Airways, who was initially selected by the Respondent to convey the mobile telephones to Saudi Arabia, and British Airways who actually transported the mobile telephones to Saudi Arabia. Hence in this Award I will refer to these two carriers respectively as "KU" and "BA". The identification of the parties who played a part in the events out of which this dispute arose, next takes me to the Claimant's agent at Riyadh Airport who was responsible for receiving the mobile telephones from BA and for making them available for collection by Sing. This agent of the Claimant was called Nimble Cargo Services Co Ltd and I will, therefore, throughout this Award, refer to this party as "Nimble".

12. Finally there was the parent company of the Claimant who also had a part to play in this dispute. At the time it was called Alpha Express International Corporation. It is now called Delta AEI Inc. I think, therefore, the most convenient description to use for it is “AEIC” which picks up the initials of its name at the time the dispute arose and thus, hereafter, I will refer to it as “AEIC”.

Documents and Statements

13. For the conduct of this arbitration I have had put before me a number of documents and statements. Since I will be referring to these documents and

statements during the course of this Award, I think it would be helpful to identify them and the references which I will be using for them.

(1) I received from the Respondent's solicitors on 14th June a complete bundle of the pleadings in the action in the High Court of Justice (Stockton-on-Tees District Registry) between HTI Europe and the Claimant. These pleadings are contained in a file which is paginated from page 1 to page 84. I will, therefore, refer to this action as the “HTI Europe Action” and to the pleadings in them as the "HTI Europe Pleadings" to which I will add the page number. Thus when I am referring to the particulars of damages claimed by HTI Europe against Alpha Express in HTI Europe's Re-Amended Statement of Claim, I will give the following reference: "HTI Europe Pleadings: p 6".

(2) I received on 13th July from the Respondent's solicitors two large files which are described as "Agreed Bundle - File 1" and "Agreed Bundle - File 2". The first of these agreed bundles contains copies of all the documents which the parties have decided to put before me. The file is not paginated but each document (or sets of documents) has been given a number. When, therefore, I am referring to a document in this Agreed Bundle, I will refer to the document number. Thus when I am referring to the fax sent on 28th February 1996 from Linda Jack of HTI Europe to

Victor Jason of Alpha Express, I will give the reference "Bundle 1: doc 10". The second of the Agreed Bundle files is broken up into sections. The first section (following through on the document numbers used in File 1) contains, under divider no 97, the Claimant's Particulars of Claim in this arbitration and the next section, under divider no 98, the Respondent's Defence in this arbitration. The third section, under divider No 99, contains the pleadings in the HTI Europe Action. The final section, under divider no 100, contains copies of all the witness statements, and attached documents, filed in the HTI Europe Action. Since the pleadings in this arbitration, and the pleadings in the HTI Europe Action, have been separately served upon me I am not using the first three sections of this Agreed Bundle. However, concerning the last section of it I am using, and making reference to, the statements in it and the documents attached to these statements. In doing so I will use the surname of the deponent and the paragraph number of the deponent's statement or document number of the document attached to that statement. Therefore when referring to the evidence of Alpha Express's witness, Mr. Colin Thynne in paragraph 4 of his statement I will give the reference "Thynne: para 4". Similarly when referring to the copy of the fax transmission of 28 February 1996 from Linda Jack of HTI Europe to Victor Jason of Alpha Express of which there is also a copy attached to Mr Thynne's statement, I will give the reference "Thynne: doc 2".

(3) I have also received, as specially prepared for this arbitration, a number of statements from both the Claimant and the Respondent. To some of these statements documents have been attached. The bulk of these statements were received by me on 17th August but, as mentioned earlier, I received two further statements from the Respondent on 6th and 9th October. The Claimant, in serving its statements upon me provided, in addition to the statements from Mr Roger Girton, Mr Douglas McNab and Mr Per Magnofferson, copies of the statements of Mr Thynne and the three other deponents which had been filed in the HTI Europe Action and which were already before me in the Agreed Bundle File 2. I have already proposed how I will refer to these statements, which were filed in the HTI Europe Action, and I will, therefore, refer to *all statements* by the same method and will use the surname of the deponent and the paragraph number of the statement or document number of the attached document Thus when I am referring to the statement, or documents attached to it, of the Respondent's witness Thore Jacobsson, I will use the reference "Jacobsson: para 3" or "Jacobsson: doc 2". This exercise is made slightly more complicated by the second statement of the Respondent's witness Jan Jansen because the documents attached to this statement are grouped together in two schedules. Thus in this instance I will refer to the schedule number rather than the document number.

Essential Facts of Dispute

14. The essential facts of this dispute fall into a very small compass. Having made an initial approach on 27th February 1996 with a follow-up fax (Thynne: doc 1) HTI Europe contacted Alpha Express on 28th February over the shipment of XXX Siemens mobile telephones and component parts and YYY Ericsson mobile telephones and component parts from warehouses in the Stockholm and Gothenburg areas in Sweden (departing respectedly from Arlanda and Gothenburg Airports) to Riyadh in Saudi Arabia. In the first place the contact was by telephone but this was followed up by two faxes from Linda Jack of HTI Europe - the first being addressed to Victor Jason of Alpha Express and the second being addressed to Chris Thynne of Alpha Express (Bundle 1: docs 10 and 11 – also, for first fax, Thynne: doc 2). Beyond any doubt at all HTI Europe was requesting Alpha Express to have these telephones transported on a 'ship to hold' basis (see requests contained in *all three* above faxes) which meant, in simple terms, that the telephones were not to be released in Saudi Arabia into the hands of the buyer without the authority of HTI Europe or, on its behalf, the authority of Alpha Express or Unity. Pursuant to this request from HTI Europe, Air Express, through Victor Jason ("Mr Jason"), relating to the XXX Siemens mobile telephones, and through Chris Thynne ("Mr Thynne") , relating to the YYY Ericsson mobile telephones, contacted Unity to ask them to arrange for the

shipment of these two consignments of mobile telephones. At Unity Mr Jason got into contact with Til Hanff ("Mr Hanff") relating to the Siemens consignment and Mr Thynne got in contact with Thore Jacobsson ("Mr. Jacobsson") relating to the Ericsson consignment. After the arrival of these two consignments of mobile telephones at Riyadh Airport, the XXX Siemens telephones were released to Sing by Nimble without the authority of either HTI Europe or of Unity or of Alpha Express while the YYY Ericsson telephones were held by Nimble at Riyadh Airport until the appropriate authority had been received for their release. The release of the XXX Siemens mobile telephones occurred because Sing appears to have put pressure upon Nimble by producing either an Airway Bill (see below) upon which there was no instruction for the telephones to be held, pending further authority, at Riyadh Airport, and/or by producing evidence of the payment of these telephones into the bank account of HTI Middle East - the party who was first in contact with Sing over the sale of these telephones. There was undoubtedly some duplicity by HTI Middle East who refused to pass on to HTI Europe this payment as received into their bank account from Sing.

15. Since HTI Europe was unable to recover the payment moneys from HTI Middle East (who, in turn, appears to have been in a dispute with HTI Hong Kong) HTI Europe took proceedings in the Stockton-on-Tees District Registry of the High Court of Justice against Alpha Express. Having brought in Unity as a third party into the proceedings, the HTI Europe Action was settled on the basis that Alpha

Express paid HTI Europe £ WWW. Thus Alpha Express is now seeking to recover these moneys from Unity plus certain costs which it incurred in the HTI Europe Action.

16. Out of these facts the narrow point for decision by me as Arbitrator is (i) whether Unity was under a duty, in transporting the Siemens telephones to Riyadh Airport, to ensure that these telephones were kept at Riyadh Airport on a 'ship to hold' basis until the appropriate authority had been given by HTI Europe or Alpha Express or itself for their release, and (ii) if Unity was under that duty whether it acted in breach of it. If Unity was under this duty and was in breach of it, it follows that the Claimant is entitled to succeed in the entirety of its claim. In the reverse if Unity was not under this duty, or if it was under this duty but satisfactorily performed it, then the Claimant's claim fails in its entirety.

Governing Laws

17. Under Order 2 of my Orders for Directions of 11th May 2000, it was agreed that:

> "I will rule what governing law or governing laws should be applied in deciding the substantive issues raised in this arbitration after giving each party the opportunity of making representations relating to what governing law should apply and to what substantive issues."

Accordingly both parties have taken considerable trouble in making representations to me upon the governing laws which I should apply during the conduct of this arbitration. I am most grateful to both Alpha Express and Unity for this assistance and am particularly grateful for the advice which Mr Per Magnofferson and Mr Henrik Bardach gave to me upon applicable Swedish law. Clearly both of them are very distinguished Swedish lawyers.

18. Having given careful thought to the applicable governing laws I have come to the conclusion that each of the applicable governing laws essentially brings out the same answer. However it is only by a proper analysis of the applicable governing laws for this dispute that it is possible to reach this conclusion.

19 The starting point is to consider what governing law applied overall to the transaction conducted between Alpha Express and Unity. It appears from the advice given to me both by Mr Magnofferson and Mr Bardach that Swedish law has an identical approach to English law on deciding what is the applicable governing law to a contract, or other transaction, taking place between the two parties. It is a very simple test, although it is not always easy to apply. The test is to which country, and hence to which country's laws, is the contract or transaction between the parties most closely connected. I therefore readily agree with the advice of Mr Bardach in the paragraph which is to be found at the top of

page 3 of his expert opinion. I agree, therefore, that the Swedish courts, based upon the advice given to me by both him and Mr Magnofferson, should have "little difficulty" in concluding that Swedish law was applicable to the contract between Alpha Express and Unity for the transporting of the telephones from Sweden to Saudi Arabia. I would add that if I took the starting point of English law - the lex forum for this dispute - I would come to an identical conclusion. I think this is important because whether this issue is decided under English law or Swedish law, the same result occurs. The law, therefore, which, in my view, applies to the contract between Alpha Express and Unity is Swedish law because Unity is a Swedish company, with a principal base of business in Sweden, all the arrangements for the transport of the telephones were activated in Sweden, at the start of the agreement between Alpha Express and Unity the telephones were located in Sweden and the acts of Unity as the 'freight forwarding' agent of Alpha Express all took place in Sweden. It is noteworthy too that the decision to apply Swedish law as the governing law of the transaction between the parties also accords with Article 4(1) of the Rome Convention.

20. The next decision, applying Swedish law, is to decide whether the terms, contained in the three contractual documents which have been put before me, are applicable in this dispute between Alpha Express and Unity and, if there are, do these contractual terms impact upon Swedish law and to what degree? The contractual terms, to which I refer, are contained in the Exclusive International

Agency Agreement which was entered into between AEIC (“Alpha Express International Corporation, a Delaware corporation with its principal offices…..in Connecticut…” in the USA) and Unity dated 15th October 1988 ("the Agency Agreement"), the General Conditions of 1985 of the Nordic Forwarders' Association ("the Nordic Conditions") and the Co-operation Agreement of February 1999 (the exact date in February 1999 not being given on the face of the document) between Alpha Express and Unity (“the Co-operation Agreement”). I will consider, in turn, each of these contractual terms.

Agency Agreement

21. The parties take completely different positions over the Agency Agreement. The Claimant asks that I treat it as incorporated into its contract with the Respondent. On its side the Respondent denies that the Agency Agreement is applicable to this dispute.

10. The Agency Agreement, if applicable in this dispute, is important for two principal reasons. Firstly under clause 3, it puts Unity under the obligation:

> "[to] observe and comply with all directions, instructions and policies of AEIC ... [and] to indemnify and hold harmless AEIC, its subsidiaries and affiliated companies [*which **includes** Alpha Express*] ... from any and all

> claims, damages, expenses or causes of action arising out of and related to this agreement [or] for the failure to perform the services pursuant to this agreement…."

22. Secondly, clause 14 of the Agency Agreement stipulates:

> "This Agreement constitutes the full understanding by and between the parties and will supersede any and all prior agreements by and between the parties concerning the sale of air freight transportation. This Agreement may be modified or amended *only by a written instruction executed by the same formality* as this Agreement." [emphasis added]

23. Thus, if the Agency Agreement is applicable to this dispute, Unity was under a strict obligation to comply with, as I construe clause 3, not only the "directions, instructions" etc received directly from AEIC but also from its subsidiary companies including Alpha Express. Similarly, under clause 3, if applicable to this dispute, Unity was under an obligation to indemnify Alpha Express for, inter alia, failing to comply with a direction or instruction given to it by Alpha Express.

24. Clause 14 of the Agency Agreement is important because it excludes the right of either Alpha Express or Unity to bring into play other agreements, relating to "the

sale of air freight transportation" except when the Agency Agreement has been "modified or amended ... by a written instrument executed with the same formality as”..it. Thus, if the Agency Agreement is applicable to this dispute, it follows that the parties are not entitled to invoke the Nordic Conditions which, in turn, would prevent the Respondent seeking to limit its liability on the basis of fixed sums calculated against the weight of the lost goods (with an overall cap of SDR 50,000) under Condition 25 of the Nordic Conditions. Similarly the Respondent would not be able to rely upon Condition 29 of the Nordic Conditions which could make the Claimant's claim against it barred for being out of the limitation period set out in this Condition.

25. In support of its case that terms of the Agency Agreement applies to this dispute, the Claimant asserts, while a number of provisions of the Agency Agreement appear just to relate to Unity *receiving goods* into Sweden (viz clauses 1.A to 1.G of the Agency Agreement), it has wider application. In particular the Claimant relies on clause 1.K

> "[Unity] will solicit and route cargo over the mutual services of AEIC and Unity"

which it states should be read in the context of the evidence provided by Mr Douglas McNab (“Mr. McNab”) General Counsel of AEIC (see McNab: para 4) that the AEIC global network has

> "offices in 705 cities including 262 cities in the United States, 165 cities in Europe, and 278 cities in Asia, South Pacific, the Middle East, Africa and Latin America".

Hence the Claimant asserts that this clause is referring to the whole range of AEIC’s global air freighting which the Claimant further asserts must include the air freighting of *goods out* of Sweden.

26. Secondly the Claimant submits that clause 3 and clause 14 of the Agency Agreement must be read together and, being read together, cover all the Group's sales "of air freight transportation" (see Claimant's Final Submissions: paragraph 11).

27. Thirdly the Claimant asserts that paragraphs 6 to 10 of Exhibit A of the Agency Agreement expressly cover the compensation due from Unity to AEIC for "shipments originating in Sweden with destination[s] in the USA…Europe…Australia…” and other countries outside Sweden. (see McNab: para 3[iv])

28. The final principal point taken by the Claimant is that

> "There is *nothing* in the Agency Agreement to *limit it* to the transportation of cargo to Sweden from other countries and not vice versa." [Emphasis added] (Claimant's Final Submissions: para 10.)

29. In response the principal assertions of the Respondent are

(i) Alpha Express was not a party to the Agency Agreement and, as I understand it, is not entitled to rely upon its terms, and

(ii) the Agency Agreement was limited to services performed by Unity for "the *receipt* of cargo *imported* into Sweden from other countries". [Emphasis added] (see paragraph 3 of Defence.)

30. In its Final Submissions the Respondent, in my view correctly, abandons the point that Alpha Express, as a subsidiary company of AEIC, was not entitled to rely upon the terms of the Agency Agreement. The Respondent is right to abandon this point because in the preamble to the Agency Agreement it is absolutely plain that the Agency Agreement covers services provided by Unity both to AEIC *and its subsidiaries* which, in turn, *includes* Alpha Express. In

developing its second reason for asserting that the Agency Agreement should not be applied to this dispute, the Respondent argues that not only was the bulk of the Agency Agreement directed to Unity *receiving goods imported into Sweden* but, in reference to what might appear to be, Unity's role relating to exports from Sweden, this was limited to Unity acting as *principal* (and *not* as agent) for AEIC or any of its subsidiaries (see paras 46 and 47 of Respondent's Final Submissions). Concerning Exhibit A of the Agency Agreement the Respondent asserts that those Articles in it (viz Articles 6 to 10) which relate to shipments out of Sweden are identifying Unity as an 'intermediary' and not 'as the import agent (within Article 1.A to J of the Agreement)' nor was Unity performing any role here which would fall under 'soliciting' or 'routing' of cargo within the meaning of Article 1.K of the Agency Agreement (see Respondent's Final Submissions: para 51).

31. The decision upon whether the Agency Agreement should be held to apply to this dispute rests, in the first place, upon Swedish law which I have held to be the overall governing law for this dispute. To that end I am assisted by the advice on Swedish law given to me by Mr Magnofferson and by Mr Bardach. The advice of Mr Magnofferson is that the Agency Agreement would be applicable to this dispute:

> "if it is applicable to the course of conduct between the parties or standard practice between all the companies in the AEI Group, or during the correspondence in connection with formulation of the contract it was agreed it would apply." (Magnofferson: para 2.1)

Mr Magnofferson then goes on to state that, having read the statement of Mr McNab, he believes, under Swedish law, the Agency Agreement would be held to be applicable. Mr Magnofferson then adds that if Unity wanted to free itself from the Agency Agreement or some of its terms, it should have prior to, or at the time of, the making of the contract between itself and Alpha Express

> "made a specific reference to those particular conditions to seek to agree to override the Agency Agreement". (ibid: para 2.1)

Mr Magnofferson then advises that, under Swedish law, the Terms and Conditions of the Agency Agreement would be "applicable by analogy" notwithstanding that the Agency Agreement itself was governed by the laws of the USA. (ibid para 2.1)

32. In his advice to me Mr Bardach states that the decision on the applicability of the Agency Agreement is a matter:

> "solely for the London arbitrator to determine based on the evidence of fact before him concerning whether or not this transaction is caught by the Agreement." (Bardach: in second numbered para 1 on second page)

He goes on to state that he gives this advice on the basis that this decision does "not depend on issues of Swedish law". He does, however, go on to advise me on whether the Swedish courts would apply the terms of the Agency Agreement "by analogy" and concludes that they would not because the terms of the Agency Agreement appear *not* to have been "intended to regulate the situation" (Bardach: in the second numbered paragraphs 1 and 2 on second page).

33. Notwithstanding the advice of Mr. Bardach it seems to me that Swedish law *must apply* to the *basic decision* whether the Agency Agreement forms part of the contract between the parties and, therefore, it also seems to me that the correct approach, under Swedish law, is to consider whether the Agency Agreement was "applicable to the course of conduct between the parties or standard practice" between the companies in the AEIC Group. I come to that conclusion because there is no other way to deciding, under Swedish law, the applicability of the Agency Agreement. Of course *in construing the terms themselves* of the Agency Agreement *I am governed by the laws of the USA* which is the governing law of the Agency Agreement itself. Unfortunately, in this exercise, I am not assisted by the assertion of Mr McNab that, since to his knowledge, Unity has carried out

extensive exporting of consignments out of Sweden and, in doing so, has never used another freight forwarder, this was "unequivocal evidence that they [Unity] accept that the exclusive international Agency Agreement ...is applicable to such transactions" i.e. all the AEIC Group exports out of Sweden. (McNab: para 4) I so state because this evidence of the conduct of business does not itself place Unity under "unequivocal evidence" of acceptance of the Agency Agreement unless it can be shown that there has been an *actual nexus* between the exporting of each consignment and the Agency Agreement itself.

34. Thus, I believe, the only approach for me, which is the approach used by both parties, is to look at the terms of the Agency Agreement and to decide whether those terms covered the freight forwarding responsibilities which Unity undertook in this transaction of arranging the carriage of the Siemens telephones from Sweden to Saudi Arabia. In, therefore, construing the terms of the Agency Agreement, which I do under US law and which I do (in the absence of being told that US law differs here from English law) by giving the terms of the Agency Agreement their ordinary and proper meaning, I narrowly come down on the side of the Claimant. In reaching this decision, I acknowledge that the Agency Agreement appears to have been principally set up for Unity to act as agent *in receiving consignments* into Sweden. Nonetheless there are wider terms to be found in the Agency Agreement in clauses 1.K, 1.L and Clause 3 as read with Clause 14. While I thank and congratulate Ms Karen Brittle, Counsel for the

Respondent, in drafting the Respondent's Final Submissions, for her detailed analysis of terms of the Agency Agreement, I think, relating to her point (see Respondent's Final Submissions: para 51) upon the Agency Agreement limiting the role of Unity to one of 'principal' or 'intermediary' for the forward freighting of consignments out of Sweden, that *this construction* of the terms of the Agency Agreement is *too narrow*. I thus prefer the broader approach adopted by Mr Allen Cool, Counsel for the Claimant, in his equally excellently drafted final submissions, when he asserts that clauses 1.K, 1.L and Clause 3 as read with Clause 14, do have a wider construction and fundamentally there is (as I have quoted earlier) "nothing in the Agency Agreement to limit it to the transportation of cargo to Sweden from other countries ...". (see Claimant's Final Submissions paras 7-13 but, in particular, para 10)

The Nordic Conditions

35. It follows from Article 1 of the Nordic Conditions that, if the Agency Agreement is applicable to the contract between the Claimant and the Respondent, these Conditions do not apply to it. I so hold because Article 1 of the Nordic Conditions plainly reads that

> "these conditions will apply to the performance of all contracts concluded with members of the Nordic Association of Freight Forwarders"

except when the parties have "otherwise expressly agreed". It follows, therefore, if the Nordic Conditions are not applicable to this dispute then the Respondent cannot rely upon Article 25 (which would limit its liability based upon the weight of the goods) and upon Article 29 (which could make the Claimant's claim against the Repondent, in the third party proceedings in the HTI Europe Action, outside the stipulated limitation one year period and out of time.)

36. Since I am holding that the applicability of the Agency Agreement to this dispute between the parties excludes the use of the Nordic Conditions, I need not consider, at least in detail, the arguments produced by each party on the applicability of the Nordic Conditions. I will just observe that, but for the Agency Agreement applying to this dispute, I would have held that the parties were bound by the Nordic Conditions. It seems to me that there is quite sufficient evidence that Alpha Express knew that Unity conducted its business under the Nordic Conditions. There is ample evidence of an active trading relationship between Alpha Express and Unity (see the recent record of it: Bundle 1: doc 38 and Jansen I: second attached document). Thus following the advice of Mr. Magnofferson where there has been a “general course of dealing between the parties”, following the General Motors case in the Swedish Supreme Court, which he cited (see Magnofferson: para 2.2) and following the detailed advice of Mr. Bardach upon “incorporation by reference” and upon “previous course of

dealings and custom of the trade" (see Bardach: paras (i) and (ii) in third, fourth and fifth pages of his expert opinion) I would have been quite happy to have treated the Nordic Conditions as applicable.

37. I should add, however, that I would ***not*** *have held*, under Swedish law as advised to me by Mr Magnofferson, that the Respondent could have relied upon Articles 25 and 29 of the Nordic Conditions for limiting or excluding its liability. This is because Unity's right to rely upon these two Articles *would* ***only*** have arisen ***if*** *I had held* that Unity was *under a duty* to properly notify Nimble at Riyadh Airport that the consignment of Siemens telephones were not to be released except under appropriate authority, it *would have been* an act of "gross negligence" within the meaning of Swedish law *to have* ***failed*** to carry out this duty. (see Magnofferson: para 2.4) Similarly Swedish law upon limitation of actions would have come into play. (see Magnofferson: para 2.5.1) Thus under Swedish law Unity would not have been entitled to rely upon these two Articles for the purpose of limiting or excluding its liability to Alpha Express. Also, under the advice from Mr Magnofferson, it would appear that there was an arguable claim under section 36 of the Swedish Contracts Act that these two clauses were void for "unfairness". In that regard I would have in particular in mind the "unfairness" of limiting liability under Article 25, based on the weight of the consignment, when transporting particularly valuable, but light in weight goods, such as mobile telephones. Indeed if there had been on 1st January 1985 (the effective date of

the Nordic Conditions) the worldwide use of mobile telephones and hence the worldwide freighting of them, I doubt if Article 25 would have been drafted in the way in which it was drafted.

38. Hence it is my conclusion that the parties would have not been in any significantly different position if the Nordic Conditions had applied. I would add that if my finding had been that neither the Agency Agreement nor the Nordic Conditions applied, the parties, in my view, would again have not have been in a significantly different position. If I understand correctly the advice (as cited in the above paragraphs) given by both Mr Magnofferson and Mr Bardach, Swedish law, in these circumstances, would have still looked at trade practices and how they impacted upon the contract between Alpha Express and Unity. In doing so, if the conclusion is that Unity was not under any obligation, beyond the steps it took, to notify Nimble at Riyadh Airport, that the consignment of Siemens telephones were being sent to Saudi Arabia on a 'ship to hold' basis, then Unity would have been absolved altogether of liability to Alpha Express.

39. On the other hand, as I also understand the advice from Mr Magnofferson and Mr Bardach, if my findings were to have been the other way round, namely that Unity was under a duty directly to inform Nimble that a consignment of Siemens telephones were being sent on a 'ship to hold' basis and it was in breach of that duty, it seems to me that Unity would then, under Swedish law, have been held

wholly liable to Alpha Express for the entirety of Alpha Express's claim against it. For completeness I would have made identical findings under English law if English law was the governing law of the contract between the parties.

The Co-operation Agreement

40. Mr Magnofferson advises that the Co-operation Agreement:

> "can be regarded as the result of a re-negotiation of the earlier agreement between AEI and Unity"(Magnofferson: para 2.3)

with the result that these:

> "re-negotiations led to an amendment of the initial agreement" (Magnofferson: ibid)

and that the further result of that "amendment of the initial agreement" would have meant that

> "Unity would have waived their right to claim the period of limitation" (Magnofferson: ibid)

Mr Magnofferson then goes on to advise that, under Swedish law, it would be held that Alpha Express:

> "under no circumstances intended to waive [its] right to seek indemnification from Unity." (Magnofferson: ibid)

Thus Mr Magnofferson goes on to believe that the role given to Unity under the Co-operation Agreement would be construed under Swedish law to place Unity in the position of dealing with the indemnity claim arising out of the HTI Europe Action now being claimed against it:

> "regardless of earlier agreements" (Magnofferson: ibid).

41. I have been given no advice from Mr Bardach of the applicability of the Co-operation Agreement, under Swedish law, to this dispute between the parties.

Since, therefore, if Swedish law applies to the applicability of the Co-operation Agreement, I should accept the advice of Mr Magnofferson.

42. In fact I have come to the conclusion that the Co-operation Agreement must be, under the same conflict of laws rules which are applied in Sweden and in England (both being consistent with Article 4(1) of the Rome Convention) that the governing law for the Co-operation Agreement is English law. This Co-operation Agreement arose out of proceedings which had been instituted in England and related to the parties co-operating with one another in the conduct and settlement of these English proceedings: the HTI Europe Action. As it seems to me that the Co-operation Agreement was essentially rooted in England relating, as it did, specifically to the activities of both the Claimant and the Respondent in England.

43. However, once again, I find that the application of Swedish law and English law produces the same result. Under English law if I was *not* to have applied the doctrine of equitable estoppel against Unity, which I would be entitled to do, it seems to me that it was clearly an implied term of the Co-operation Agreement that Unity was waiving any right it had to claim that Alpha Express's claim against it was barred by being out of a limitation period. Moreover, if *I was to have applied* the doctrine of equitable estoppel I would have held that Unity was,

by entering into the Co-operation Agreement, estopped from relying upon any limitation period contained in the Nordic Conditions or elsewhere.

44. Since I have already held that the Respondent is not entitled to rely upon Conditions 25 or 29 of the Nordic Conditions to limit or exclude its liability, this point does not arise. Nonetheless if I had held that the Nordic Conditions had applied, I am quite clear that I could not have accepted the Respondent's contention that it was entitled to rely upon the limitation protection of the Nordic Condition 29. I would not, however, have taken the same position over Nordic Condition 25 although I would have been open to argument that the English Unfair Contract Terms Act 1977 could have been brought into play. It is, therefore, for these reasons that I have concluded that the likelihood is that the parties would not have been in any significantly different position if the Nordic Conditions, coupled to the Co-operation Agreement, had applied to this dispute between them.

The Crucial Issue

45. This brings me to decide the crucial issue in this arbitration. Was Unity under a duty to ensure that Nimble knew the consignment of Siemens telephones was to be held at Riyadh Airport on a ‘ship to hold’ basis and that these goods were not

to be released until express authority had been given by either HTI Europe, Alpha Express or Unity for their release to the buyer, Sing.

46. In making this decision I have before me a detailed statement from the Claimant's witness Mr Roger Girton, whose knowledge and experience of the freight business goes back nearly 40 years and the first and second statements of the Respondent's witness, Mr Jan Jansen whose knowledge and experience in the air freight forwarding business goes back to almost 35 years. Both of these witnesses are clearly highly experienced in the air freight forwarding business and, I am sure, greatly respected by the industry in which each of them have worked so long with considerable distinction. Unfortunately each of them gave to me exactly the opposite advice.

47. In summary it is the Claimant's case, applying either the Agency Agreement or established trade practice, that, in the circumstances of this consignment of these telephones, Unity, through the person of Til Hanff, should have directly and expressly notified Alpha Express's agent in Saudi Arabia, Nimble, that the goods were being sent to Saudi Arabia on a 'ship to hold' basis and they should not have been released except on the express authority of HTI Europe, Alpha Express or Unity - the latter two acting on instructions received from HTI Europe.

48. To the contrary the essence of the Respondent's case is that that duty did not rest upon Unity whose responsibilities ceased once the goods had been handed over to the carrier, BA, or certainly by the time BA arrived at Riyadh Airport with the goods. In no longer (rightly in my view) advancing the Respondent's case in paragraph 7 of the Defence (namely that Unity's Airways Bill, relating to the Siemens consignment of telephones and dated 28th February 1996 [the "HAWB"], [Bundle 1: docs 14 and 16] was not an authentic document used in this transaction) Miss Karen Brittle takes the point that under the instructions given by Alpha Express to Mr Hanff of Unity, in the e-mail sent to him on 28th February 1996 by Mr Jason of Alpha Express (Bundle I: doc 15), he was *only* under an obligation to "make sure the goods are *marked up* for shipment *to be held* at RUH" [emphasis added].

Chronology

49. Given this conflict of evidence before me, I think the only sensible course is for me to prepare a short chronology from which I believe the true answer appears.

(1) At 13.48 hours on 28th February 1996, following a telephone call, Linda Jack of HTI Europe confirms in a fax to Alpha Express, marked for the attention of "Victor" - being Victor Jason (“Mr. Jason”) a clerk at the Alpha Express offices in Stockton-on-Tees - that arrangements should be

made for the shipment of XXX Siemens mobile telephones from Sweden to Saudi Arabia on a "ship to hold" basis (Bundle 1: doc 10 and Thynne: doc 2 – see HTI Europe's transmission time at top left of this document).

(2) Subsequently that afternoon at 15.46 hours (according to the print out at the top of the fax: see copy in Bundle 1: doc 12) HTI Europe faxes to Alpha Express the commercial invoice relating to the sale of the XXX Siemens mobile telephones. In turn it appears that Mr. Jason sent a copy of this commercial invoice onto Mr. Hanff, under the cover of a fax sheet, by fax at 17.10 hours on the same afternoon of 28th February (see Bundle 1: doc 18) In this commercial invoice (Bundle 1: doc 12 and Thynne: doc 3) the only parties, with full addresses, which are named are the shipper, HTI Europe, and the ultimate customer, Sing.

(3) At a time unknown - but shortly, as it must have been, after receiving the instruction from HTI Europe – Mr. Jason, contacted Mr Hanff of Unity to ask Unity to set up the shipment of these goods beginning with their "collection from Stockholm". On receiving these instructions Mr Hanff prepared the HAWB and faxed it to Alpha Express. Also at some time later that day Mr Thynne of Alpha Express also directly spoke to Mr Hanff and, other than confirming the instructions already given to Mr

Hanff, emphasised that this was a shipment on a "ship to hold" basis. (See Thynne paras 3 and 4 and doc 4 : Bundle 1 doc 14.)

(4) While the documents do not tell the whole story, it is quite plain that Mr Hanff did fax to Alpha Express, probably for the attention of Mr. Jason, a copy of the HWAB at a time when he had either not understood (or thought it not necessary to make a mention of it) that these goods were to be held on a 'ship to hold' basis. This appears from the e-mail sent by Mr Jason to Mr Hanff at 4.42 pm GMT on 28th February.(Bundle1: doc 15) Despite the assertions made by Mr Jansen in his first statement of 10th August 2000 and the assertions made by the Respondent in paragraph 7 of its Defence, *it is undeniable* that Mr Hanff did prepare the HWAB of 28th February and send a copy of it to Mr Jason. Mr Jason's e-mail of 28th February which was sent at 4.42 pm GMT (see Bundle 1: doc 15) carries the full reference number of this Airways Bill of Unity – the HAWB. It is therefore to be noted, at this time, that (i) the plan was to use Kuwait Airways (ii) no reference was made in the HWAB of the goods being held on a 'ship to hold' basis and (iii) Mr Hanff *knew* he was distributing an Airways Bill *in which the names and addresses of HTI Europe, Sing and Unity were clearly set out.* Moreover it appears that Mr Hanff actually sent a fax copy of the "original" of this document which

was marked for the attention of the “shipper” ie HTI Europe (Bundle 1: docs 14 and 16).

(5) At about 19.50 hours on 28th February Alpha Express sent a copy of this HAWB to HTI Europe (see fax print out at top of one of the copies of this HAWB) (Bundle 1: doc 16).

(6) During the initial stages of setting up this shipment of the Siemens telephones to Saudi Arabia the Kuwait Airways Airway Bill (No 229-31688974) was prepared and which named, as far as it can be read, HTI Europe as the shipper, Nimble as the consignee, and Unity as the carrier. Although the copy before me is very difficult to read (apparently it was printed on paper which has caused the print to fade) it appears that the copy of this KU Airway Bill was sent out by Unity about 1500 hours on, I think, 28th February - although it could be 29th February.(see bottom of page: Bundle 1: doc 20).

(7) Some time on 29th February Unity Express prepared and sent out a British Airways Airway Bill which is dated 29th February and which identifies, with full addresses, HTI Europe as the shipper, Nimble as the consignee and Unity as the carrier ("the BA AWB"). This BA AWB Airways Bill also contains the specific instructions that the shipment

should be held at Riyadh Airport until approval has been received from the Alpha Express office in Stockton–on-Tees. The words used were "SHMT TO BE HELD AT A/P UNTIL APPROVAL GIVEN FROM AEI/SOT". It is also to be noted on this BA AWB that there is a request, with its full address, that Sing should be 'notified' of, presumably, the arrival of this consignment at Riyadh Airport.

(8) Though I do not possess any skills as a handwriting expert, I have to observe that the signatures which appear over the name of Mr Hanff in the HWAB, the BA AWB and in another document prepared on 29th February at Unity (Bundle I doc 21) all seem to have the characteristics of the same signature. The Claimant has made the same point in its Final Submissions.

(9) Following his noticing on 11th March, in the "confirmations received" from Nimble that there was no mention of the Siemens mobile telephones consignment being held by Nimble at Riyadh Airport Mr Thynne was involved in a fairly frantic exchange of e-mails with Nimble starting with Mr Thynne's e-mail which was sent at 9.19 am on 11th March. In the reply sent at 12.49 pm (local time in Saudi Arabia), Mr Thynne was informed that the Siemens cargo had already been released which caused Mr Thynne to send a more frantic e-mail at 5.56 pm GMT on the same

day. This in turn brought back to Mr Thynne an e-mail on the next day from Nimble (1.40 pm [local Saudi Arabia time] 12th March) in which a fuller explanation was given about the release of the Siemens cargo (see Thynne paras 8 to 13 and Thynne: docs 10, 11 and 12 and Bundle 1: docs 43, 44 and 45)).

50. This chronology, which is almost exclusively based upon the documents before me, identifies as accurately as I can the facts upon which I should decide this arbitration. It specifically identifies that the assertion - and I understand the difficulties of Unity after the death of Mr Hanff – that Mr Hanff did not issue the HAWB, is incorrect. This is a document, contrary to the assertion of the Respondent, which did have "authenticity" and which to the knowledge of Mr Hanff was made available for circulation to all the parties named in it which included HTI Europe and Sing. Once such a document has been placed in circulation, it is wholly foreseeable that it will be made available to others such as Nimble and HTI Middle East. It was, of course, a document in which there was no reference whatever to the need for the Siemens consignment to be held on a ‘ship to hold’ basis.

51. As has been argued before me in the pleadings and Final Submissions of the parties there was a parallel consignment of YYY Ericsson mobile telephones which were being shipped, on almost exactly the same timetable, as the Siemens

mobile telephone consignment. The Ericsson consignment involved the same parties, HTI Europe as the shipper, Alpha Express as the freight forwarders, Unity acting as the freight forwarders on behalf of Alpha Express, the buyer Sing and Alpha Express's agent at Riyadh Airport, Nimble. Moreover, HTI Europe gave the identical instructions relating to the Ericsson consignment - namely that it was to be shipped on a 'ship to hold' basis and was not to be released from Riyadh Airport until express authority had been given by it and passed on by either Unity or Alpha Express to Nimble at Riyadh Airport.

52. The arrangements for the shipment of this Ericsson consignment was made between Mr. Thynne of Alpha Express and Mr. Jacobsson of Unity. Therefore, following the instructions received from Mr Thynne of Alpha Express, Mr Jacobsson prepared, on 1st March 1996, a BA Airway Bill for the shipment of this Ericsson cargo of mobile telephones. After this BA Airway Bill had been prepared it seems that it was sent by fax from Unity to Alpha Express at 1636 hours (local time in Sweden) on 1st March. This was, in 1996, a Friday and on the following Wednesday (6th March 1996) at 2.01 pm GMT, Mr Jacobsson of Unity, having received contact from Alpha Express, sent an e-mail to Nimble specifically to tell them to "hold" at Riyadh Airport the Ericsson consignment and not to release it until they had received a message from the Alpha Express Stockton-on-Tees office. This e-mail was copied into Mr Thynne of Alpha Express and carried the repeat message of "DO NOT RELEASE UNTIL YOU

RECEIVE OK FROM SOT/OFFICE" (i.e. from the Alpha Express Stockton-on-Tees office). More than that Mr Jacobsson of Unity made manuscript amendments to this BA Airways Bill to replace Sing by Nimble as the consignee and, at the same time, to note, on this BA Airways Bill, that the goods were not to be released until clearance had been received from the Stockton-on-Tees office of Express Alpha. As well as taking this action, Mr Jacobsson sent a fax at 12.38 pm on 12th March 1996 on which he wrote, on a copy of this e-mail of 6th March (to which was attached a copy of the reply from Nimble of 8th March that Nimble was confirming and understanding this instruction), a handwritten message to Mr Thynne confirming in writing the action that he had taken (Bundle 1: docs 26 and docs 31-33).

53. Not surprisingly, the Claimant relies upon this 'parallel' conduct of Unity and asserts this shows that it was and is the normal responsibility of the freight forwarder to ensure that the receiving agent of the freight, at the point of destination, is expressly told the terms under which the consignment is arriving. Hence if it is arriving on a ‘ship to hold’ basis then it is the responsibility of the freight forwarder to convey this information to the receiving agent at the place of destination both in the Airway Bill documentation and also in direct contact with that agent. It appears the reason for the direct contact is that the Airway Bills are not always readily available for inspection at the time of arrival and/or the airway bill documentation is not necessarily examined by a receiving agent before

releasing a consignment. The Claimant also takes the point, as did the Claimant witness, Mr Girton, that Nimble would not have necessarily understood the cryptic instruction (as I have quoted in paragraph 49(7) above) as endorsed on the BA AWB. Somewhat after the event this was a view expressed by Nimble itself in a fax dated 2nd March 1998 from Mr James Courage of Nimble to Mr McNab of AEIC in the USA. (See Girton para 12, Claimant's Final Submissions para 34 and Bundle 1: doc 94.)

54. The Respondent argues to the contrary. It asserts that it was only in the very special circumstances which existed, in altering the instructions in the Ericsson consignment, that Unity took on this responsibility of directly notifying Nimble not to release the Ericsson cargo. In his first statement the Unity witness Mr Jansen was unable to accept the authenticity of the HAWB and hence that an Airways Bill was being released to the relevant parties without any restraint being recorded in it concerning the release of the Siemens mobile telephone consignment when it arrived at Riyadh Airport. As already mentioned Counsel for the Respondent takes the further point that, if Unity was under any responsibility to give any information about how the Siemens consignment should be received in Saudi Arabia, it was limited to ensuring that "*the goods are marked up* for shipment *to be held at RUH*" [emphasis added] (Jansen I paras 17 to 19 and Respondent's Final Submissions paras 70 to 79).

55. I do not agree that the instruction typed on the AB AWB, for holding the Ericsson shipment at Riyadh Airport, was, in the words of Mr Courage, "just a vague notation" which was "meaningless". (Bundle 1: doc 94) With the abbreviations used in communications between freight forwarders, I do not think this note on the AB AWB would have been unintelligible to Nimble. Indeed I believe it was quite comprehensible. I agree, therefore, that, in this regard, Unity fulfilled its responsibilities. I have, however, to look at what might reasonably be expected to be the trade practice, on an issue such as this, between freight forwarders and to look at the entirety of the conduct of this shipment by Unity. In doing so I regret I have to conclude that Unity was under a rather fuller duty to make sure that Nimble knew the Ericsson consignment was to be held 'ship to hold' and should not be released until express authority had been received from HTI Europe, Alpha Express or Unity itself. In reaching this conclusion I am particularly aware of the HAWB, which carried no restraint on release of the goods on arrival at Riyadh Airport and, the likely circulation of it, to the knowledge of Unity, after Mr Hanff had sent a copy of it to Alpha Express on 28th February. It seems to me that this put the Siemens consignment under the same exposure as had the Ericsson consignment been put in the British Airways Airway Bill under which the Ericsson consignment was being freighted to Riyadh Airport. Before I pass from this point I should state that I have taken into account what Mr. Thynne said in his statement of 10th September 1997 (upon which Counsel for the Respondent relies in the Respondent's Final Submissions:

see paras 74 and 75) to the effect that he was not "concerned" over the failure in the HWAB to state the goods were to be held on a 'ship to hold' basis because he would have "expected" Alpha Express' agent in Saudi Arabia "to make reference upon receipt of the goods" to the later drawn up BA AWB. This, however, misses the point that HWAB had, to the knowledge of Mr. Hanff, received wider circulation to HTI Europe and others (including HTI Middle East [see fax from HTI Europe : Bundle 1 : doc 25] and almost certainly Sing [see fax of 2nd March from HTI Middle East Bundle 1 : doc 30]) well before the arrival of the Siemens telephones on 6th March at Riyadh Airport!

Conclusion

56. In the circumstances I have to conclude therefore not only was Unity under a full duty to ensure that the receiving agent in Saudi Arabia knew these goods were to be held until authority was given for their release but that they failed in that duty. I reach this conclusion under the terms of the Agency Agreement, particularly under Unity's duties, in Clause 3, "to comply with all directions, instructions, and policies of AEIC [and its subsidiaries]". This clause of the Agency Agreement does not, however, take me the whole way there. The *central and crucial issue*, upon which my Award *ultimately depends*, is whether Unity has complied with this duty by (***which it did)*** putting the instruction on the BA ABW for the goods to be held at Riyadh Airport until authority is given for their release or whether it

was under the further duty of (***which it did <u>not</u>***) sending a 'pre-alert' to Nimble – the use of such 'pre-alerts being described to me in the statements of Mr. Girton and Mr. Jansen (see Girton: para 16 and Jansen I: para 20). Thus I have to look at the established business practices between Unity and Alpha Express on the use of 'pre-alerts' and, more generally, on the use of 'pre-alerts' in the trade practices of the freight forwarding industry. To this extent I have to bring into account the issues which I would, in any event, have to have brought into account under Swedish law if I had held that the Agency Agreement had not been binding upon the parties. The test I apply is under US law (being the governing law of the Agency Agreement) and, in the absence of being told there is any difference here between US and English, I apply the latter. In doing so, it is noticeable, on the advice which I have received from both Mr. Magnofferson and Mr. Bardach there would have been no material difference if I had been required to apply Swedish law.

57. Strangely I am given *no information whatsoever* on the previous use of 'pre-alerts' in the many earlier occasions (as I understand it) when Unity acted as the agent of Alpha Express in handling freight forwarding consignments. I have, therefore, to fall back on the general use of 'pre-alerts' in the freight forwarding industry as described to me by Mr.Girton, Mr. Jansen and, to a certain extent, also by Mr. Thynne. The short answer, from this evidence, is that, for whatever reason, there is a trade practice of using 'pre-alerts' so that the freight forwarder

does get into direct contact (by telephone, fax or email) with the receiver of the goods at the point of destination in the country where the goods are being delivered. While Mr. Jansen claims that these pre-alerts do "not necessarily…contain[ ] information about the special instructions" (Jansen I para 20) I have to agree with Counsel for the Claimant it "is inconceivable" concerning any 'pre-alert' which Unity was under a duty to send to Nimble, upon this consignment of Siemens telephones, that such a 'pre-alert' "would not have included clear 'ship to hold' instructions". (Claimant's Final Submissions: para 34). In this regard I find it is of significance that Nimble was stating in its email of 12th March (when it was explaining the circumstances of the release of the Siemens telephones) that it expected, when goods are to be held by it at the point of entry of country destination on a 'ship to hold' basis, that – separately from the shipping documents – it should have been informed of this by "by email or phone or fax". (Bundle 1: doc 45 and Thynne: doc 12).

58. The overriding reason, however, upon why Unity was under a duty, separately from the information in the shipping documents, directly to inform Nimble that these goods were to be held under a 'ship to hold' basis was that it (*not* Alpha Express) had the *actual responsibility* for putting in place the freight forwarding arrangements which meant it was responsible for making *the entirety* of these arrangements *from the point of collection* in the warehouse in the Stockholm area *right through* to the *correct delivery* to the receiving agent at Riyadh Airport –

albeit that the receiving agent was one who had been appointed by Alpha Express. To take a different view of the respective responsibilities of Unity and Alpha Express would be to blur and ultimately to confuse their respective responsibilities. To take the analogy of the English law of bailment, the duty of Unity, as the bailee of the goods, was to take good care of the goods right to their ultimate and correct delivery to the party appointed to receive them. It would, therefore, have been an interference on the part of Alpha Express to have given direct instructions to the receiver of the goods how it should be receiving them from Unity as bailee.

59. Apart from this analogy - to which I only make a passing reference for it is Swedish law, not English law, that I am ultimately applying, - I have to take the view that there is no more vital information, for a freight forwarder to possess than what should happen to goods at the point of their arrival. Thus if goods are released, before payment is received for them, the integrity of that freight forwarding arrangement is destroyed. In this instance Unity did recognise, concerning both the Siemens and the Ericsson consignments, that information should be provided in the Airway Bills that the goods should be held on a 'ship to hold' basis. Hence, with information as important as this, all prudence suggests that the receiver of those goods should be *separately and directly told* and that the freight forwarder should have some acknowledgement of *the receipt* of this

vital information. Without these precautions, there only needs to be a missing Airway Bill or, as in this case, one which is not examined, for it all to go wrong.

Award

60. In the HTI Europe Action, HTI Europe was making the substantial claim of £ ZZZ for the monies which it lost on the Siemens consignment and another £ VVV relating to the expenses of its Director, Mr Jasper Foot, when he went out to Saudi Arabia to negotiate with Sing and HTI Middle East for the recovery of the monies which were due to HTI Europe for the sale of this telephone consignment of Siemens mobile telephones. Since, from the voluminous papers put before me relating to this visit of Mr Foot, it is plain that almost all of his time was taken up in carrying out negotiations relating to a dispute between HTI Middle East and HTI Hong Kong, I think it is unlikely that HTI Europe would have succeeded in getting a judgement against Alpha Express on these expenses. However, the position was, in my view, quite different relating to the claim of £ ZZZ upon the loss of the sale monies on the Siemens telephones. On any view, therefore, the settlement which Alpha Express reached with HTI Europe in which Alpha Express was only obliged to pay £ WWW to HTI Europe (to include costs as well as damages) was a good settlement. It seems to me, therefore, on the basis that I have decided that Alpha Express should succeed in this claim against Unity, that Unity should pay the entirety of the monies which Alpha Express has

paid to HTI Europe plus all costs and disbursements which Alpha Express incurred in defending the HTI Europe claim against it. I therefore hold that, in my Award, Unity should pay to Alpha Express the principal sum of £ AAA plus interest at the claimed 8% per annum which I

calculate as follows:-

Principal Sum	Dates	Period	Amount
£ AAA	1.3.99 to 31.1.00	11 months	£ BBB
£ AAA	1.2.00 to 28.2.01	13 months	£ CCC
£ AAA	1.3.01to 30.3.01	30 days	£ DDD
			£ EEE

Costs

61. Pursuant to my powers under Section 61 Arbitration Act 1996 and pursuant to Order 20 of my Orders for Directions of 11th May 2000, I notify the parties that I am minded to order that the Respondent pays to the Claimant all the costs of this arbitration including that portion of my own fees and expenses which the Claimant has paid to me prior to the issue of this Award. This will, therefore, be my Order for Costs unless I receive representations from the Respondent, within the next 14 days, and unless I am then persuaded, having received representations from both parties, to make a different order on costs.

Concluding Comments

62. Before I close this Arbitral Award I should like to comment that it has only been on a narrow basis that I have concluded that the Claimant should succeed against the Respondent. The arguments were very well presented on both sides and, although I am satisfied I have come to the right conclusion, it was only reached upon close scrutiny of a very small compass of facts. I am also much aware that the Claimant and the Respondent were just doing their best to fulfil their freight forwarding duties and that the wrongdoing, which resulted in HTI Europe not receiving payment for these telephones, lay principally with HTI Middle East and to a lesser extent with Sing and Nimble. On any view, therefore, both the Claimant and the Respondent have taken the short straws with, alas, the Respondent, in my judgement, taking the slightly shorter straw than the Claimant!

63. Finally I would like to express the hope that some good will come out of the making this Award. In the first place I hope this long dispute between two 'sister' companies can now be put behind them. Secondly I hope there are lessons which can be learned. Miss Flora McBean rightly took the point in the agreeable exchanges, during the conduct of this arbitration, between herself, Mr. Igor Rustie and myself, that my Award should not be directed to the future

conduct of business between the parties but to establishing which party in law was liable to the other and to what degree. Perhaps, none the less, she will allow me to comment, as my valedictory at the end of this Award, that it would help both parties in their future trading with one another and others to agree and set out, in their trading conditions, what exactly are the respective duties and responsibilities of the freight forwarders and their agents particularly relating to the instructions which are to be given to the receiving agents in the destination country for the shipped goods. Both parties may also think that the Agency Agreement, as currently drafted, is *well past* its 'sell by date' and could benefit from being entirely re-written!

I NOW THEREFORE DO MAKE AND PUBLISH THIS MY AWARD:

I **I award and direct that the Respondent pays to the Claimant within the next 30 days, the principal sum of £ AAA together with interest in the sum of £ EEE;**

II I also award and direct that the Respondent pays further interest to the Claimant, calculated at £ FF per day, from the date of this Award until the payment in full of the principal sum of £ AAA;

III Subject to further representations being made and accepted by me, I further direct that the Respondent pays to the Claimant costs, to be assessed or agreed, within 30 days of such agreement or assessment.

PUBLISHED IN LONDON, ENGLAND, WHICH IS THE SEAT OF THIS ARBITRATION

DAVID HACKING

ARBITRATOR **December 2000**