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WILLEM C. VIS  
INTERNATIONAL  
COMMERCIAL ARBITRATION MOOT

1999-2000

INSTITUTE OF INTERNATIONAL COMMERCIAL LAW  
PACE UNIVERSITY SCHOOL OF LAW

**MEMORANDUM FOR CLAIMANT**

UNIVERSITY OF HEIDELBERG

RICHARD BLAIR • CLAUDIA BOCK

STEFAN HUBER • STEFAN MAAßEN • JENS WENZEL

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LONDON COURT OF INTERNATIONAL ARBITRATION

Case No. Moot 7

**LEGAL POSITION IN RESPONSE TO THE ISSUES**  
**IN THE TERMS OF REFERENCE**

**ON BEHALF OF :**

**Feed Processing Corp.**

123 Industrial Avenue,

Highlands,

Mediterraneo

**CLAIMANT**

**AGAINST :**

**Grain Dealers, PLC**

26 Export Pl.

Southside City

Danubia

**RESPONDENT**

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B. Mr. Dean's written statement should not be excluded under Art. 20.4 LCIA Rules

- 1.) An exclusion of the written statement requires a prior order of attendance
- 2.) Mr. Dean's written statement is to be admitted as full evidence since his absence is for good cause
- 3.) In the alternative, the Tribunal should exercise its discretionary power to give full weight To Mr. Dean's written statement
  - a.) Written and oral testimonies are equivalent means of proof
  - b.) Admission of the written testimony does not prejudice RESPONDENT's rights
  - c.) Disregard of Mr. Dean's statement violates CLAIMANT's right of due process of law

## **II. This Tribunal has full jurisdiction to decide on the instant case**

A. CLAIMANT and RESPONDENT concluded an arbitration agreement

- 1.) The parties agreed on arbitration during their telephone conversation of 19 February 1998
  - a.) The agreement is evidenced by Mr. Dean's written testimony
  - b.) The agreement is evidenced by Mr. Stern's written testimony
- 2.) The agreement was confirmed and reiterated by the parties' subsequent behaviour
  - a.) Their subsequent behaviour shows that the parties considered themselves bound by a contract
  - b.) RESPONDENT cannot rely on its declarations to the contrary
  - c.) The parties' subsequent behaviour confirmed and reiterated their agreement

B. Any form requirement applicable to the arbitration agreement is met

- 1.) CLAIMANT's confirmation letter of 20 February 1998 meets the requirements of the LCIA Rules
- 2.) The agreement is in writing as required by the UNCITRAL Model Law and the New York Convention of 1958
  - a.) Parties agreed in writing on the arbitration clause contained in the Danubia Sales Conditions
  - b.) The arbitration clause was incorporated into the parties' agreement by reference to the Standard Sales Conditions

C. Alternatively, CLAIMANT can rely on the alter ego doctrine

## **III. CLAIMANT and RESPONDENT concluded a contract of sale**

### **IV. RESPONDENT committed a breach of contract**

A. RESPONDENT had no right to avoid the contract

- 1.) No duty to modify a contract is recognised by the CISG
- 2.) CLAIMANT was under no obligation to accept partial delivery per Art. 60 CISG
  - a.) Art. 60 CISG cannot be invoked in the case of an anticipatory declaration not to deliver in accordance with the contract
  - b.) RESPONDENT cannot invoke Art. 60 CISG, since it deliberately decided to perform in two partial deliveries
  - c.) Additionally, RESPONDENT cannot rely on Art. 60 CISG since the proposed delivery would have constituted a fundamental breach
    - aa.) The altered mode of delivery proposed by RESPONDENT would have constituted a fundamental breach of contract in the sense of Art. 25 CISG
    - bb.) The consequential loss of confidence underlines the classification of a partial delivery as a fundamental breach

B. By its final refusal to deliver, RESPONDENT committed a breach of contract per Art. 45 CISG

- 1.) RESPONDENT committed an anticipatory breach of contract by refusing to deliver

2.) RESPONDENT's breach amounts to a fundamental breach under Art. 25 CISG

**V. CLAIMANT is entitled to damages of \$ 90,000**

A. CLAIMANT is entitled to damages as a consequence of its cover purchase per Art. 45 (1)(b) and 75 CISG

1.) RESPONDENT expressly refused to perform the contract

2.) CLAIMANT is entitled to recover its expenses incurred by the reasonable cover purchase

B. Alternatively, CLAIMANT can rely on Art. 74 CISG to claim \$ 90,000

C. RESPONDENT is not exempt from paying damages per Art. 79 CISG

1.) There was no impediment hindering RESPONDENT's performance

2.) The purported impediment would not have been beyond RESPONDENT's control

3.) RESPONDENT could have been expected to overcome the purported impediments

D. CLAIMANT acted in accordance with any duty to mitigate loss according to Art. 77 CISG

1.) A duty to mitigate loss arose at the earliest, when CLAIMANT received RESPONDENT's refusal to deliver

2.) CLAIMANT complied with its duty as of 16 June 1998

3.) In the alternative, CLAIMANT did not violate any duty to mitigate loss at an earlier stage

E. CLAIMANT is entitled to interests on the sum of \$ 90,000 pursuant to article 78 CISG

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Annex: Chronology of the facts [not reproduced]

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### **Abbreviation Index**

AAA	American Arbitration Association
Arb.	Arbitration
Art.	Article

AZ	Aktenzeichen (Case reference)
CPC	Código del procedimiento civil (Spanish Code of Civil Procedure)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Sammlung von Entscheidungen des Bundesgerichtshofes in Zivilsachen (The official reporter of cases decided by the German Federal Supreme Court on civil matters)
cf.	confer (compare)
CISG	United Nations Convention on contracts for the International Sale of Goods of 11 April 1980
Clunet	Journal du droit international
E.D.	Eastern District
e.g.	exempla gratia (for example)
EWir	Entscheidungen zum Wirtschaftsrecht
F.2 <sup>nd</sup>	Federal Reporter, Second Series (USA)
ff.	following
FOB	free on board (Incoterm)
F.Supp.	Federal Supplement
GIPR	Schweizer Bundesgesetz über das Internationale Privatrecht (Swiss Federal Law on International Private Law)
GG	Grundgesetz (German Constitution)
IBA	International Bar Association
ibid.	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
i.e.	id est (that means)
INCOTERMS	Incoterms 1990. International Commercial Terms of the ICC, ICC publication n° 460
JZ	Juristenzeitung
LG	Landgericht (German Regional Court)
LCIA	London Court of International Arbitration
NCPC	Nouveau Code de Procédure Civile (French Code of Civil Procedure )
N.D.	Northern District
NJW	Neue Juristische Wochenschrift
No.	Number

NY	New York
NY Conv.	Convention on the recognition and enforcement of foreign arbitral awards
OLG	Oberlandesgericht (German Regional Court of Appeal)
p.	page
para.	paragraph
P.2d	Pacific Reporter 2 <sup>nd</sup> series
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIW	Recht der Internationalen Wirtschaft
SchwBG	Schweizer Bundesgericht (Swiss Federal Supreme Court)
S.D.	Southern District
Sec.	Section
ULIS	Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UML	Uncitral Model Law
U.S.	United States; United States Supreme Court Reports
v.	versus (against)
YCA	Yearbook of commercial arbitration
ZIP	Zeitschrift für Wirtschaftrecht
ZPO	Zivilprozeßordnung (German/Austrian Code of Civil Procedure)

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### **Statement of Facts**

On 19 February 1998, Claimant, Feed Processing Corp. (hereinafter referred to as CLAIMANT), represented by its employee, Mr. Harold Dean, entered into a telephonic contract of sale with Grain Dealers PLC. (hereinafter referred to as RESPONDENT). The contract was on the basis of the Standard Conditions of Sale No. 5 of the Danubia Feed and Grain Association which stipulate that all potential disputes are to be settled by arbitration by the LCIA. They also specify that the law of the state of Danubia, including the CISG, is applicable to the contract. In derogation of these Standard Conditions, partial shipments were expressly excluded. The contract called for July delivery of 6,000 tons of standard feed wheat at the price of \$ 60 per ton, FOB Danubian Port. Payment was by means of a letter of credit expiring 31 August 1998. The contract was confirmed in writing by CLAIMANT the following day.

After the occurrence of floods in Danubia, an export prohibition was imposed from 17 April to 20 May 1998, followed by a license system. RESPONDENT was allocated 240,000 tons of wheat, an amount sufficient to honour all contracts entered into prior to 17 April 1998. However, on 21 May 1998, RESPONDENT informed CLAIMANT of its intent only to deliver 4,800 tons in the period fixed by the contract. RESPONDENT demanded modification of the letter of credit to provide for the partial shipment of 1,200 tons of wheat in November.

CLAIMANT refused to accept such a modification and requested implementation of the contract according to its terms. On 16 June 1998, RESPONDENT declared its definite refusal to deliver at all. Consequently, CLAIMANT purchased 6,000 tons of wheat in replacement at the market price of \$ 75 on 18 June 1998. As a result CLAIMANT suffered a loss of \$ 90,000. [For a detailed chronological summary of the facts, see Annex.]

Therefore, in response to the Tribunal's Procedural Order No.1 we respectfully make the following submissions on behalf of our client Feed Processing Corp. (CLAIMANT)

- Firstly, we will show that the written statement of Mr. Harold Dean is to be given full weight (Issue I),
- Secondly, we will show that an arbitral agreement had been concluded between CLAIMANT and RESPONDENT (ISSUE II),
- Thirdly, we will show that CLAIMANT and RESPONDENT concluded a sales contract (ISSUE III),
- Fourthly, we will show that RESPONDENT committed a breach of contract (ISSUE IV),
- Finally, we will show that CLAIMANT is entitled to damages and hence RESPONDENT has to bear all legal costs (ISSUE V)

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## Argument

### **I. Mr. Dean's written statement is of full evidential value**

This Tribunal should find the written statement of Mr. Dean<sup>[1]</sup> to be admissible and to be of full weight. The LCIA Rules applicable to this issue afford equivalent value to witness testimonies whether presented in written or oral form (A.). Assertions by RESPONDENT<sup>[2]</sup> that the instant facts amount to an exception to this basic principle are unfounded (B.).

#### ***A. Mr. Dean's written statement is to be given full weight according to Art. 20.3 LCIA Rules***

The parties both expressly<sup>[3]</sup> and implicitly<sup>[4]</sup> submitted themselves to the LCIA Rules and the material applicability of these rules is undisputed. Art. 20.3 LCIA Rules unambiguously states that a witness testimony may be tendered in written form.

The testimony of Mr. Dean was taken by counsel for CLAIMANT and signed by the witness.<sup>[5]</sup> This is in conformity with the LCIA Rules<sup>[6]</sup> as well as with international arbitration practice.<sup>[7]</sup> Moreover, Mr. Dean has to be treated as a witness regardless of his former employment per Art. 20.7 LCIA Rules.<sup>[8]</sup> Therefore, Mr. Dean's statement fulfils all the requirements of a valid testimony according to Art. 20.3 LCIA Rules.

The formulation of Art. 20.3 LCIA Rules precludes any conclusion that written testimonies are of reduced weight in arbitral proceedings. Furthermore, under this provision signed statements and sworn affidavits are evidence of equal value. Consequently, in application of Art. 20.3 LCIA Rules the statement in question should be admitted and be given full weight.

#### ***B. Mr. Dean's written statement should not be excluded under Art. 20.4 LCIA Rules***

As illustrated above, Art. 20.3 LCIA Rules demands that written testimonies be treated as valid evidence. Any deviation from this rule must only occur under the restrictive requirements of Art. 20.4 LCIA Rules.<sup>[9]</sup> However, neither the formal nor the material requirements of this exception are met on the instant facts:

The Tribunal has not ordered CLAIMANT to produce Mr. Dean as a witness. Therefore, Art. 20.4 cannot be a basis for the exclusion of his written statement (1.). Even on the application of Art. 20.4, the written statement is to be admitted, since Mr. Dean's absence is for good cause (2.). Thirdly, a rational use of the Tribunal's discretionary power per Art. 20.4 LCIA Rules should render the written statement fully admissible (3.).

#### **1.) An exclusion of the written statement requires a prior order of attendance**

According to Art. 20.4 LCIA Rules, this Tribunal has a discretionary power to limit the weight of written statements in the case of a non-appearance of the witness. However, this power is subject to the condition that the Tribunal has previously ordered the party to produce the witness. This is evident from the construction of Art. 20.4 LCIA Rules.<sup>[10]</sup> This Tribunal never ordered CLAIMANT to present Mr. Dean. Consequently, Art. 20.4 LCIA Rules cannot constitute the basis for an exclusion of his written testimony.

#### **2.) Mr. Dean's written statement is to be admitted as full evidence since his absence is for good cause**

Even if this Tribunal should find that an order of attendance is not required, it should nevertheless give full weight to Mr. Dean's written statement since his absence would be for "good cause" under Art. 20.4 LCIA Rules. Reference to national laws and court decisions demonstrates the low threshold of the term.<sup>[11]</sup> According to legal principle, this term may be defined as a "legally sufficient ground or reason"<sup>[12]</sup> or as any ground which is

"not arbitrary"[13]. In the case of the absence of a witness, a ground is legally sufficient, if it constitutes an obstacle to the attendance and the party invoking it has not created the reason in order to rely on "good cause".[14]

On the instant facts, CLAIMANT can invoke several reasons for Mr. Dean's absence, all of which constitute sufficient reason. Firstly, CLAIMANT is involved in legal proceedings with Mr. Dean not related to the instant procedure. With this litigation pending, both CLAIMANT and Mr. Dean have a legitimate interest in avoiding any contact which might prejudice their respective positions. Furthermore, CLAIMANT is no longer Mr. Dean's employer.[15] Thus, it lacks any coercive power arising out of the employer-employee relationship to force Mr. Dean's attendance at an oral hearing. Finally, CLAIMANT has no other legal or factual possibility to enforce Mr. Dean's attendance, since he is presently a resident of Mediterraneo. This state's legal system does not provide court assistance for arbitration proceedings.[16] CLAIMANT did not cause these circumstances in order to prevent Mr. Dean's attendance at an oral hearing.[17] Therefore, the Tribunal should conclude that the non-appearance of Mr. Dean is for good cause. Accordingly, his written statement should be admitted and given full weight.

### **3.) In the alternative, the Tribunal should exercise its discretionary power to give full weight to Mr. Dean's written statement**

Even assuming Mr. Dean's absence is without good cause, this Tribunal should nonetheless consider the respective interests of the parties in exercising its discretionary power under Art. 20.4 LCIA Rules. A rational exercise of that power should lead to the admission of the written statement as full evidence.

#### **a.) Written and oral testimonies are equivalent means of proof**

Attaching less weight to a written testimony may only occur in circumstances where its evidential quality would be inferior to a corresponding oral testimony. On the instant facts, Mr. Dean's written testimony is thorough and unambiguous. No information of probative value not yet known to the Tribunal would be disclosed as a result of Mr. Dean's personal attendance. Since witnesses are expected to be heard only on facts not already included in written evidence[18], Mr. Dean's absence should not influence the value of his evidence.

Moreover, since arbitration aims at a swift and efficient resolution of legal disputes[19], the appearance of witnesses is limited and the use of written testimonies encouraged.[20] Consequently, the equivalency of written and oral testimonies is recognised by internationally respected arbitration rules and conventions as well as by national courts.[21] Above all, this principle is prevalent in Art. 20.3 LCIA Rules, applicable to the instant dispute.[22]

Finally, this Tribunal should consider that an oral hearing of Mr. Dean may even have constituted an infringement of Art. 20.2 and 14.1.ii of the LCIA Rules. The combination of these provisions demands that unnecessary hearings be avoided. [23] Thus, the lack of such a hearing should not have a negative influence on the value of Mr. Dean's written testimony.

#### **b.) Admission of the written testimony does not prejudice RESPONDENT's rights**

RESPONDENT has the full opportunity to present its case and to underline its arguments by any means of proof. The admission of Mr. Dean's written statement without an oral examination does not constitute an infringement of RESPONDENT's procedural rights. These rights are inevitably influenced by the nature of arbitration. Integral to arbitration is that *"a party relinquishes its courtroom rights, including that to subpoena witnesses [...]"*. [24] Thus, on several occasions, courts have ruled that the presentation of evidence in the form of written statements instead of the personal testimony of the witness is of no significance and cannot constitute a violation of due process of law.[25] Arbitrators are not bound by rules of evidence and procedure observed in national legal systems and may, therefore, disregard the right to cross examination.[26] Accordingly, courts uphold arbitral awards where the parties had no opportunity to oral examination of witnesses.[27] Hence, as RESPONDENT can fully present his case and its rights are not infringed, this Tribunal should find the written statement admissible as full evidence.

#### **c.) Disregard of Mr. Dean's statement violates CLAIMANT's right of due process of law**

While the admission of Mr. Dean's written testimony would not prejudice RESPONDENT's rights, any disregard of his testimony would violate CLAIMANT's right of due process of law. This universally recognised right guarantees a basic level of procedural fairness, especially ensuring the opportunity to present one's case.[28] Art. 14.1 i LCIA Rules as well as Art. 18 UNCITRAL Model Law (UML) expressly refer to that aspect.[29] An integral part of presenting one's case is *"the right of controverting, by proof, every material fact which bears upon the question of right in the matter involved"*. [30] Indeed, the concept of due process of law is considered to be of such importance that its violation would even hinder the enforcement of the award under most legal systems.[31]

Undeniably, Mr. Dean's testimony is an important piece of evidence in favour of CLAIMANT. As shown above, CLAIMANT has no authority to require the attendance of Mr. Dean to the hearing.<sup>[32]</sup> Hence, without Mr. Dean's written statement, CLAIMANT would have no means of bringing his testimony before this Tribunal and could not adequately present its case. CLAIMANT has no influence on this situation. Any disregard of the written testimony would amount to the exclusion of evidence of considerable instructive value. Therefore, the admission of Mr. Dean's written statement as full evidence is indispensable to the preservation of CLAIMANT's right to due process of law.

To conclude, in exercising its discretionary power in a rational manner, this Tribunal should have regard to the foregoing arguments. Therefore, it should find that Mr. Dean's written testimony be admissible and be given full weight.

## **II. This Tribunal has full jurisdiction to decide on the instant case**

This Tribunal should exercise its Competence-Competence by virtue of Art. 23.1 LCIA Rules and find that it has jurisdiction to decide on the merits of the instant case. CLAIMANT and RESPONDENT concluded an arbitration agreement (A.). This agreement meets any applicable form requirement (B.). Alternatively, CLAIMANT may rely on the *alter ego* doctrine (C.).

### **A. CLAIMANT and RESPONDENT concluded an arbitration agreement**

CLAIMANT and RESPONDENT concluded a contract of sale, incorporating an arbitration agreement during their telephone conversation on 19 February 1998 (1.). This agreement was confirmed and reiterated by the parties' subsequent correspondences and conduct (2.).

Since the parties have concluded the arbitration agreement in relation to an international sales contract and since the places of business of CLAIMANT and RESPONDENT are in two different contracting states of the CISG, this Convention applies on the instant facts pursuant to Art. 1 (1) (a). It is widely accepted that the CISG not only govern the existence of contracts of sale but also the formation of incorporated arbitration agreements.<sup>[33]</sup>

#### **1.) The parties agreed on arbitration during their telephone conversation of 19 February 1998**

CLAIMANT and RESPONDENT entered into an arbitration agreement during their telephone conversation on 19 February 1998. On this day, Mr. Dean was employed as purchasing agent for CLAIMANT.<sup>[34]</sup> In this capacity, he agreed with RESPONDENT's employee Mr. Stern on a sale of standard feed wheat. Both parties expressly referred to the Danubia Feed and Grain Association Standard Conditions of Sale No. 5 containing an arbitration clause. This agreement is evidenced both by Mr. Dean's (a.) and Mr. Stern's (b.) written testimonies.<sup>[35]</sup>

##### **a.) The agreement is evidenced by Mr. Dean's written testimony**

From Mr. Dean's written testimony it is clear that RESPONDENT concluded an agreement with CLAIMANT on 19 February 1998. On that date, Mr. Dean expressly declared that he was acting on behalf of CLAIMANT.<sup>[36]</sup> Nonetheless, RESPONDENT now alleges that Mr. Dean contracted on behalf of IMPORTS.

However, this perception is contrary to an interpretation of the parties' declarations under Art. 8 CISG. Per Art. 8 (2) CISG, declarations are to be interpreted according to the understanding of a reasonable person. The actual intent only prevails where the other party cannot be unaware of it per Art. 8 (1) CISG.

In the light of Mr. Dean's unambiguous declaration, Mr. Stern as any other reasonable person, could not have been unaware that Mr. Dean was acting on behalf of CLAIMANT.

Mr. Stern, on the other hand, concedes in his written testimony that he did not make any inquiry as to the party whom Mr. Dean represented. Therefore, Mr. Dean as any reasonable person, must have understood that Mr. Stern meant to contract with CLAIMANT. Even if Mr. Stern's intent was actually to contract with IMPORTS, this intent cannot be taken into account per Art. 8 (1) CISG, since Mr. Dean could not have been aware of it in the light of his prior declarations.<sup>[37]</sup>

Hence, Mr. Dean's testimony establishes that CLAIMANT and RESPONDENT entered into an arbitration agreement.

##### **b.) The agreement is evidenced by Mr. Stern's written testimony**

If the Tribunal should find Mr. Dean's written testimony not fully admissible, the above conclusion still results from Mr. Stern's written testimony. He admits that Mr. Dean declared that he was purchasing for CLAIMANT.<sup>[38]</sup> Mr. Stern argues that this did not necessarily mean that the contracting party was CLAIMANT. In so far, Mr. Stern relies on prior transactions which he had negotiated with Mr. Dean, while the latter was employed by IMPORTS.<sup>[39]</sup>

Such reliance is unjustified. Mr. Stern concedes that he was told on 19 February 1998 about changes in the supply organisation of CLAIMANT, i.e. that CLAIMANT would no longer purchase via IMPORTS, but build up its own purchasing department.<sup>[40]</sup> Mr. Stern also admits that Mr. Dean did not say that these changes in circumstances would only affect future transactions.<sup>[41]</sup> Thus, nothing in Mr. Stern's testimony justifies Mr. Stern's personal understanding that Mr. Dean's declarations only referred to future transactions. The only possible conclusion must be that this understanding was a mistake committed by Mr. Stern.

In fact, in light of the surrounding circumstances it is untenable that Mr. Dean made express reference to the future. On 19 February 1998, Mr. Dean was already working for CLAIMANT, and therefore he mentioned this change to Mr. Stern. Since he was already exercising his new functions at CLAIMANT, there was no reason for Mr. Dean to refer only to future transactions.

In the absence of any objective basis indicating that Mr. Dean's declarations related only to future transactions, it had to be clear to a person in the same circumstances as Mr. Stern that Mr. Dean was acting on behalf of CLAIMANT. Therefore, this interpretation prevails according to Art. 8 (2) CISG.

Mr. Dean, on the other hand, could not have been aware of the intent of Mr. Stern to deal with IMPORTS.<sup>[42]</sup> According to an interpretation per Art. 8 (2) CISG, Mr. Stern offered the conclusion of the contract to CLAIMANT and Mr. Dean accepted on behalf of CLAIMANT. Consequently, the instant facts prove the conclusion of an arbitration agreement between CLAIMANT and RESPONDENT on 19 February 1998.

## **2.) The agreement was confirmed and reiterated by the parties' subsequent behaviour**

The subsequent behaviour of both parties shows that they considered themselves bound by a contract between them (a.). RESPONDENT is estopped from relying on any assertions to the contrary (b.). Consequently, the parties confirmed and reiterated their agreement by their subsequent behaviour (c.).

### ***a.) Their subsequent behaviour shows that the parties considered themselves bound by a contract***

As is apparent from the letters dated 20 and 24 February 1998 respectively, the scope of the contractual obligations including the arbitration clause is not subject to discussion.<sup>[43]</sup> RESPONDENT's objection relates exclusively to the identity of the contracting party.<sup>[44]</sup> However, the parties' behaviour subsequent to these letters shows that RESPONDENT dealt with CLAIMANT and that it was aware of this.

Indeed, RESPONDENT's correspondences and negotiations after the telephone conversation were exclusively with CLAIMANT. On 2 March 1998, RESPONDENT began to conclude further contracts with IMPORTS.<sup>[45]</sup> Thus, by this date, RESPONDENT knew that Mr. Dean was no longer employed there. This is confirmed by Mr. Stern's letter of 17 April 1998 in which he declares that he positively knew that Mr. Dean was then working for CLAIMANT.<sup>[46]</sup>

At the latest on this date, RESPONDENT must have been aware that Mr. Dean could no longer act on behalf of IMPORTS. Any further correspondence concerning a purported contract with IMPORTS would therefore not have been sent to Mr. Dean. Nevertheless, RESPONDENT continued to communicate with Mr. Dean. Thereby he behaved like a contracting party towards CLAIMANT.

Furthermore, by the letter dated 21 May 1998, RESPONDENT even requested a modification of the contract addressing Mr. Dean.<sup>[47]</sup> Mr. Dean's acceptance however, could only have bound CLAIMANT. In this light, it is inconsistent for RESPONDENT to allege that it was contracting with IMPORTS, while RESPONDENT in fact exclusively dealt with CLAIMANT.

Furthermore, having received CLAIMANT's letter of credit on 29 May 1998,<sup>[48]</sup> it was definitely clear to RESPONDENT that IMPORTS was not at all related to the contract. In all RESPONDENT's preceding transactions with IMPORTS, it was IMPORTS who performed the obligation to pay RESPONDENT.<sup>[49]</sup> Being aware thereof, RESPONDENT continued its negotiations with CLAIMANT as is evidenced by its letters of 29 May and 3 June 1998,<sup>[50]</sup> thereby confirming the contractual relationship with CLAIMANT.

As a result, CLAIMANT's as well as RESPONDENT's conduct proves that they considered themselves bound by a contract.

### ***b.) RESPONDENT cannot rely on its declarations to the contrary***

RESPONDENT now relies on its letter dated 24 February 1998<sup>[51]</sup> and references to IMPORTS in its other letters to assert that it concluded a contract with IMPORTS. However, it is estopped from relying upon its declarations to this effect by its behaviour described above which confirmed the existence of a contract.<sup>[52]</sup>

The principle of estoppel and the prohibition of *venire contra factum proprium* are universally recognised principles of international law.<sup>[53]</sup> Accordingly, the CISG reflects these principles in Art. 8 (3) and 7 (1).<sup>[54]</sup>

Thus, under the CISG, a party is bound by his behaviour which induces reasonable reliance of the other party, regardless of any declarations to the contrary.

In the light of RESPONDENT's behaviour,<sup>[55]</sup> it was reasonable for CLAIMANT to rely on a contract between RESPONDENT and CLAIMANT. RESPONDENT, however, in its letter dated 24 February 1998, had declared to be contracting exclusively with IMPORTS instead of CLAIMANT.<sup>[56]</sup> This declaration is highly contradictory to RESPONDENT's subsequent dealings with CLAIMANT when it actually acted as CLAIMANT's contracting party. Hence, the principle of estoppel precludes RESPONDENT from invoking this letter.

Furthermore, RESPONDENT referred to IMPORTS in the headnotes which appeared in the letters it sent to CLAIMANT. Yet, the prohibition of *venire contra factum proprium* prevents RESPONDENT from relying on these references since they are in direct contradiction to its behaviour as established under a.), i.e. addressing all correspondences to Mr. Dean knowing that the latter could only represent CLAIMANT.

In fact, RESPONDENT tried to rely on its formal declarations and on its letter dated 24 February only after the occurrence of the dispute. Therefore, RESPONDENT's behaviour must prevail and preclude RESPONDENT from any reliance on its declarations to the contrary contained in its letter dated 24 February 1998 and its subsequent correspondences.<sup>[57]</sup>

**c.) *The parties' subsequent behaviour confirmed and reiterated their agreement***

By their subsequent behaviour, the parties confirmed the agreement concluded during the telephone conversation per. According to Art. 8 (3) CISG, this conduct is to be taken into account in interpreting parties' declarations. As shown above, their material subsequent behaviour leads to the conclusion that CLAIMANT and RESPONDENT had entered into a contract during the telephone conversation.

Furthermore, regardless of any prior agreement during the telephone conversation of 19 February 1998, CLAIMANT's and RESPONDENT's subsequent behaviour itself would be sufficient to constitute an agreement. Under the CISG, the existence of a contract does not require that offer and acceptance be clearly identified as separate declarations. On the contrary, it is sufficient that parties express their common conviction to be bound.<sup>[58]</sup> This is confirmed by international case law.<sup>[59]</sup> CLAIMANT and RESPONDENT acted as contracting parties<sup>[60]</sup> thereby expressing a conviction to be bound to each other.

As a conclusion, CLAIMANT and RESPONDENT confirmed and reiterated their agreement by their behaviour. This agreement included an arbitration agreement by reference to Clause 13 of the Danubia Feed and Grain Association Standard Conditions of Sale No. 5 (Standard Sales Conditions).

**B. *Any form requirement applicable to the arbitration agreement is met***

The arbitration agreement concluded between CLAIMANT and RESPONDENT meets any applicable form requirement contained in the LCIA Rules (1.), as well as in the UNCITRAL Model Law and the NYConv (2.).

**1.) CLAIMANT's confirmation letter of 20 February 1998 meets the requirements of the LCIA Rules**

The form requirement demanded by the LCIA Rules is a "written reference" providing for arbitration.<sup>[61]</sup> This is met by the confirmation letter sent by CLAIMANT on 20 February 1998.<sup>[62]</sup> It refers to Clause 13 of the Standard Sales Conditions which contains the agreed arbitration clause. Hence, the confirmation letter constitutes a reference in writing to the arbitration agreement according to the LCIA Rules.

**2.) The agreement is in writing as required by the UNCITRAL Model Law and the New York Convention of 1958**

The agreement also meets the requirements of the UML adopted by Danubia and the New York Convention of 1958 (NYConv). Art. 7 (2) UML is modelled on Art. II of the NYConv.<sup>[63]</sup> Therefore, authorities ruling that the form requirement is met under the NYConv may be *a fortiori* instructive in order to establish a written agreement under the UML. Should the NYConv nevertheless be regarded as being more strict,<sup>[64]</sup> the lower requirements of the UML would prevail pursuant to Art. VII (1) NYConv.<sup>[65]</sup> In compliance with the UML and the NYConv, the parties made reference to the arbitration clause in writing (a.) and thereby incorporated it into their agreement (b.).

**a.) *Parties agreed in writing on the arbitration clause contained in the Danubia Sales Conditions***

Art. 7 (2) UML and Art. II NYConv require that the arbitration agreement be in writing. This requirement is to be interpreted in the light of the realities of international trade, demanding swift and efficient communication.<sup>[66]</sup> Accordingly, in the case *Israel Chemicals and Phosphates Ltd. v. N.V. Algemeene Oliehandel* <sup>[67]</sup> it was held that this form requirement is met if only one party issues a document containing an arbitration clause. In the cited case, the arbitration clause had never been mentioned before. *A fortiori*, the form requirement must be fulfilled on the instant facts. CLAIMANT and RESPONDENT had already agreed on

arbitration during their telephone conversation,<sup>[68]</sup> before CLAIMANT confirmed this agreement in its letter of 20 February 1998.

A purposive interpretation of the form requirements supports this position. Firstly, form requirements serve to sufficiently warn the parties of their responsibilities to one another.<sup>[69]</sup> On the instant facts, RESPONDENT used the Standard Sales Conditions as standard practice.<sup>[70]</sup> It must have been entirely aware that these Conditions contained the arbitration clause in question. Hence, RESPONDENT did not need any protection provided by the written form requirement. Secondly, form requirements serve to provide a record of the content of an arbitration clause.<sup>[71]</sup> Such purpose is also fulfilled when only one party issues a document containing the arbitration clause. In the present case, the content of the arbitration clause was easily determinable.

Even on a strict interpretation of the UML and the NYConv,<sup>[72]</sup> the form requirements are met. Both CLAIMANT and RESPONDENT exchanged written documents containing their assent to arbitration. In their letters of 20 and 24 February 1998, the parties referred expressly to Standard Sales Conditions containing the arbitration clause. In this context, RESPONDENT cannot rely on its declaration to be contracting with IMPORTS.<sup>[73]</sup> Thus, these letters constitute an agreement in writing per Art. 7 (2) UML and Art. II NYConv.

Assuming, but not conceding, that the contractual agreement was only reached by the parties' correspondences between 17 April and 16 June 1998,<sup>[74]</sup> the form requirements are nonetheless met. The contractual terms relating to arbitration were firstly established during the telephone conversation on 19 February 1998. They were confirmed by letter on 20 and 24 February 1998, respectively. During subsequent written negotiations, the arbitration clause was never disputed. On the contrary, both CLAIMANT and RESPONDENT, in their correspondences between 17 April and 16 June 1998, referred to their contractual obligations previously set out. Thus, they considered the arbitration clause to be an integral part of their contract. Consequently, these written correspondences constitute an exchange of documents containing each party's assent. Thus, even on this alternative interpretation of the facts, the relevant form requirements are satisfied.

#### ***b.) The arbitration clause was incorporated into the parties' agreement by reference to the Standard Sales Conditions***

According to Art. 7 (2) UML, the arbitration clause itself does not have to be reproduced in a written agreement. It may also be contained in a separate document to which the parties refer, thereby incorporating it into their agreement.<sup>[75]</sup> It is sufficient, in order to incorporate the arbitration agreement, that the parties refer to general conditions containing the arbitration clause among other provisions.<sup>[76]</sup> Especially if the parties are used to submitting to arbitration, the arbitration clause itself does not have to be mentioned in the reference to the document that contains it.<sup>[77]</sup> On the instant facts, RESPONDENT being an experienced international trader, it regularly included the arbitration clause in question in its contracts.<sup>[78]</sup> Thus, the reference to the Standard Danubia Sales Conditions made by the parties in their letters dated 20 and 24 February 1998 respectively, incorporated the arbitration clause into the contract.

In the light of the foregoing arguments, this Tribunal should find that the parties validly concluded an arbitration agreement and that it has jurisdiction to decide on the merits of the instant case.

#### ***C. Alternatively, CLAIMANT can rely on the alter ego doctrine***

Assuming, but not conceding, that RESPONDENT's assertion was correct and it had contracted with IMPORTS, CLAIMANT may validly proceed to arbitration on the basis of the *alter ego* doctrine.

According to this doctrine, the jurisdiction of a tribunal may be extended to legal entities which have not themselves concluded an arbitration agreement.<sup>[79]</sup> In order to proceed to arbitration on this basis, firstly such a non-signatory company must be closely affiliated with another company which has actually concluded the material arbitration agreement.<sup>[80]</sup> Secondly, the company must be materially engaged in the implementation of the contract and must be economically interested in its outcome.<sup>[81]</sup> CLAIMANT's position, on the instant facts, fits within these criteria.

Firstly, CLAIMANT and IMPORTS were closely connected when the contract between IMPORTS and RESPONDENT would have been concluded on 19 February 1998. CLAIMANT controlled the majority of shares in IMPORTS and thus could elect its own corporate officers onto IMPORTS' Governing Board.<sup>[82]</sup> Hence, CLAIMANT was in a position to influence the day to day running of IMPORTS. In fact, CLAIMANT did not operate its own importing department but in practice used IMPORTS as its supply department for importing wheat.<sup>[83]</sup> CLAIMANT exclusively imported wheat via IMPORTS and both companies acted together in each of CLAIMANT's import transactions.<sup>[84]</sup> Shipment was always directly to CLAIMANT, while payment was made by CLAIMANT via IMPORTS.<sup>[85]</sup> Hence, IMPORTS played an integral role in CLAIMANT's import strategy.

Secondly, on the instant facts, CLAIMANT was the party with an economic interest in the implementation of the contract. It was the ultimate customer. Shipment was directly to CLAIMANT and payment was made by CLAIMANT directly to RESPONDENT. In addition, CLAIMANT was exclusively involved in the transport of goods. Due to the integrated dealings of CLAIMANT and IMPORTS, RESPONDENT was aware of the privileged relationship between them and of the clear economic interest which CLAIMANT had in the transactions involving IMPORTS.<sup>[86]</sup>

The fact that the affiliation between IMPORTS and PROCESSING was terminated by 28 February 1998 is of no relevance to the instant dispute. Once a transaction concluded for the benefit of the non-signatory company in question, the decisive factor for the application of the alter ego doctrine is the material implementation of the

contract by this company.<sup>[87]</sup> The contract concluded in order to serve the economic interest of CLAIMANT was in fact implemented by CLAIMANT after the link with IMPORTS had been terminated.<sup>[88]</sup> CLAIMANT can therefore rely on the *alter ego* doctrine and proceed to an arbitration with RESPONDENT.

### III. CLAIMANT and RESPONDENT concluded a contract of sale

CLAIMANT and RESPONDENT concluded a sales contract for 6,000 tons of standard feed wheat at a price of \$60.00 per ton. RESPONDENT does not dispute this content of the contract, but challenges the identity of its contracting partner. However, it has already been established that RESPONDENT came to an agreement with CLAIMANT.<sup>[89]</sup> The arbitration agreement was an integral term of the contract. Therefore, the arguments proving the existence of the arbitration agreement between CLAIMANT and RESPONDENT are equally valid in establishing the existence of the sales contract. Furthermore, according to Art. 11 CISG, a contract of sale is not subject to any form requirement. Consequently, CLAIMANT and RESPONDENT agreed upon a contract of sale.

Alternatively, the above mentioned *alter ego* doctrine is accordingly applicable to the conclusion of the sales contract.<sup>[90]</sup> CLAIMANT was exclusively interested in the performance and outcome of the contract.

### IV. RESPONDENT committed a breach of contract

In its letter dated 16 June 1998, RESPONDENT expressly refused to honour its contractual obligation to deliver.<sup>[91]</sup> This refusal is not justified by any right of RESPONDENT to avoid the contract (A.). On the contrary, it constitutes a breach of the contract per Art. 45 (1) CISG, amounting to a fundamental breach in the sense of Art. 25 CISG (B.).

#### A. RESPONDENT had no right to avoid the contract

RESPONDENT's refusal to deliver would only be justified if RESPONDENT had the right to avoid the contract according to either Art. 64 (1) or Art. 72 CISG. In any case, such a right would require a breach of contract by CLAIMANT<sup>[92]</sup>.

However, CLAIMANT did not breach the contract. The only obligation due by 16 June 1998 was the obligation to pay the price pursuant to Art. 54 CISG.<sup>[93]</sup> CLAIMANT provided for a letter of credit to the amount of \$ 396,000 open until 31 August 1998.<sup>[94]</sup> Thereby CLAIMANT performed its obligation of payment according to the terms of the contract. It had no duty to align the letter of credit to accommodate partial delivery, as requested by RESPONDENT in its letters dated 21 May, 22 May, 29 May and 3 June 1998.<sup>[95]</sup>

Such an obligation could only arise in the case of a modification of the contract or if CLAIMANT was required to accept a partial delivery per Art. 60 CISG. However, the CISG does not recognise a duty to accept the modification of a contract (1.). Without modification of the contract, Art. 60 CISG did not impose on CLAIMANT the duty to accept a partial delivery, not in accordance with the contract (2.). Thus, CLAIMANT fulfilled all its obligations. Any reliance by RESPONDENT on Art. 64 (1) or Art. 72 CISG is therefore unjustified.

#### 1.) No duty to modify a contract is recognised by the CISG

RESPONDENT requested CLAIMANT to amend the letter of credit to accommodate partial delivery.<sup>[96]</sup> This demand is to be interpreted as a request for modification of the contract. Pursuant to Art. 29 (1) CISG, any modification of the contract would have required the consent of both parties. CLAIMANT immediately rejected RESPONDENT's request for partial delivery.<sup>[97]</sup> Consequently, no modification was agreed upon. The letter of credit did not have to be aligned to accommodate partial delivery.

Furthermore, CLAIMANT was under no duty to accept a modification of the contract, since the CISG does not recognise such an obligation. It is paramount in international trade that contractual obligations are upheld.<sup>[98]</sup> Giving one party the possibility of unilaterally imposing a modification of the contract would be completely unacceptable, violating the principle *pacta sunt servanda*.<sup>[99]</sup> This principle is inherent to the system of the CISG. Indeed, under the Convention, a party is bound to its obligations regardless of its subjective ability to perform. The duty to pay damages according to Art. 45, 74 ff. CISG arises independently of any fault.<sup>[100]</sup> If exceptional circumstances make performance impossible, a party may solely rely on Art. 79 CISG. This provision however, does not allow a modification of the contract but merely exempts a party from paying damages.<sup>[101]</sup> Consequently, the CISG does not recognise a duty to alter the terms of a contract.<sup>[102]</sup> Hence, CLAIMANT could reject any modification of the contract without committing a breach of contract.

#### 2.) CLAIMANT was under no obligation to accept partial delivery per Art. 60 CISG

Since the contract was not modified, CLAIMANT could insist on an implementation of the contract according to its initial terms. RESPONDENT cannot rely on Art. 60 CISG to impose a duty to accept partial delivery that was not in accordance with the contract and to align the letter of credit accordingly.

Art. 60 CISG requires that the buyer take reasonable steps to enable delivery and to take possession of the goods. This does not impose the duty to accept goods in cases where the seller expressly states, before the date of delivery, that the delivery will not be in accordance with the terms of the contract (a.). Moreover, Art. 60 CISG cannot be invoked, since RESPONDENT deliberately decided to perform its obligations only partially (b.). Finally, on the instant facts CLAIMANT was not obliged to accept partial delivery which would have amounted to a fundamental breach (c.). Consequently, CLAIMANT did not breach its obligation to pay the price per Art. 54 CISG by not aligning the letter of credit to accept a mode of delivery it did not have to accept. As a result, RESPONDENT cannot rely upon Art. 64 (1) or Art. 72 CISG.

#### a.) Art. 60 CISG cannot be invoked in the case of an anticipatory declaration not to deliver in accordance with the contract

Art. 60 CISG provides that the buyer must accept delivery as specified by the contract. CLAIMANT insisted on the delivery of 6,000 tons of wheat, as stipulated in the contract.<sup>[103]</sup> Even if Art. 60 CISG may oblige the buyer to accept partial delivery, in direct derogation of the contract, in cases where the goods are physically offered to him, such an obligation cannot arise in the case of an anticipatory declaration to deliver in derogation of the contract.

Indeed, it is reasonable to require the buyer to accept partial delivery which is physically offered to him, when the goods have been transported. Refusing the goods would require sending them back, thereby causing extra cost and inconvenience. In such a case, it is adequate to demand that the buyer accept this delivery and then claim damages or request remedy by the seller.<sup>[104]</sup> Thus, Art. 60 CISG indirectly protects the seller by limiting his damages liability for incomplete performance.

In contrast to this, if a seller declares, before performance is due, that he will not perform according to the terms of the contract, he is in no need of protection. At this point, the goods are still at the seller's place of business. He is not exposed to the risk of incurring costs and the inconvenience of transporting the goods back to his place of business. In such circumstances, a balanced consideration of the respective interests of buyer and seller must lead to the conclusion that Art. 60 CISG does not require the buyer to accept altered delivery. The seller may not demand that the buyer take such delivery and refer him to damages or to his other remedies.<sup>[105]</sup>

The instant facts clearly fall within the second situation. Prior to the contractual date of performance, RESPONDENT declared its intent to deliver in derogation of the contract. The wheat had not yet been transported and was still at RESPONDENT's disposal. Thus, RESPONDENT was not in a situation where CLAIMANT's refusal to accept a partial delivery could have placed any burden upon it.<sup>[106]</sup> Hence, RESPONDENT may not and need not rely on Art. 60 on the instant facts. As a result, CLAIMANT did not have to accept partial delivery. RESPONDENT had therefore, no right to avoid the contract.

***b) RESPONDENT cannot invoke Art. 60 CISG, since it deliberately decided to perform in two partial deliveries***

Art. 60 CISG obliges a buyer to take delivery under the terms of the contract. This is a primary obligation necessary for the reasonable performance of the contract. If a seller encounters hinderances to delivery, the buyer may exceptionally have the duty to accept delivery under altered conditions. This duty would arise from an interpretation of Art. 60 CISG in the light of the principle of good faith as set out in Art. 7 CISG.<sup>[107]</sup> On the other hand, the seller cannot rely on such a duty, in cases where he himself acts contrary to the principle of good faith.

On the instant facts, neither the floods nor the governmental export restrictions in Danubia prevented RESPONDENT from performing its contractual obligations.<sup>[108]</sup> RESPONDENT had a sufficient amount of wheat at its disposal to honour all its firm contractual obligations.<sup>[109]</sup> The export license was a global allocation.<sup>[110]</sup> Thus, it was RESPONDENT's own decision to offer CLAIMANT the delivery of only 4,800 tons in a first shipment. There was no compelling reason for this decision. RESPONDENT allocated the remaining 1,200 tons to third parties. This was contrary to the principle of good faith.<sup>[111]</sup> As a result, RESPONDENT itself cannot rely on this principle. This confirms that CLAIMANT had no duty per Art. 60 CISG to accept the partial delivery proposed by RESPONDENT.

***c) Additionally, RESPONDENT cannot rely on Art. 60 CISG since the proposed delivery would have constituted a fundamental breach***

RESPONDENT's reliance on Art. 60 CISG must furthermore be excluded since the proposed delivery would have amounted to a fundamental breach of the contract.

It is widely recognised that the buyer cannot be obliged to accept delivery in the sense of Art. 60 CISG if the delivery constitutes a fundamental breach of contract by the seller.<sup>[112]</sup> In such a case, the buyer is entitled to avoid the contract under Art. 49 (1) (a) CISG. It would be in contradiction to this remedy to force the buyer to accept such a delivery pursuant to Art. 60 CISG and then claim damages. Imposing such an acceptance would render his right to avoid ineffective, since he would actually be compelled to continue with the implementation of his contractual obligations. Therefore, as soon as delivery in the proposed way would constitute a fundamental breach of contract, the buyer is never obliged to accept this delivery.

Consequently, CLAIMANT was not obliged to accept the altered mode of delivery, proposed by RESPONDENT. The partial delivery itself would have constituted a fundamental breach of contract (**aa.**). This is underlined by the loss of confidence in a further faithful implementation of the contract which would result from such a delivery (**bb.**).

***aa.) The altered mode of delivery proposed by RESPONDENT would have constituted a fundamental breach of contract in the sense of Art. 25 CISG***

RESPONDENT proposed to deliver only 4,800 tons of wheat in July, without being able to stipulate a certain date for delivery of the remaining 1,200 tons.<sup>[113]</sup> Performing in such a manner would have amounted to a fundamental breach. Pursuant to Art. 25 CISG, a breach of contract is fundamental if it results in such detriment to the other party as "substantially to deprive him of what he is entitled to expect under the contract" unless this detriment was not foreseeable.

"Detriment" in the sense of Art. 25 CISG does not require any damage or actual loss.<sup>[114]</sup> On the contrary, detriment means the frustration of an interest which a party has under the terms of the contract.<sup>[115]</sup> Whether a party's detriment is to be qualified as substantial depends on the weight given by the parties to that particular interest in their contract.<sup>[116]</sup>

On the instant facts, the contract between CLAIMANT and RESPONDENT was based on the Standard Sales Conditions providing for partial shipments. However, in express derogation thereof, the parties agreed on delivery by only one shipment.<sup>[117]</sup> This illustrates the substantial importance which the parties afforded to this mode of delivery. In such a case, the failure to comply with this specific term in itself is sufficient to constitute a substantial detriment without a particular interest of the injured party being damaged.<sup>[118]</sup> However, in the instant dispute, CLAIMANT's specific interests would have been prejudicially affected by partial delivery.

Firstly, the parties had agreed on a FOB clause, thereby putting the burden of transport on CLAIMANT. Partial delivery would have meant a second shipment with the corresponding costs and inconveniences.<sup>[119]</sup> The freight costs would have risen unproportionally due to the smaller amount of wheat to be shipped.<sup>[120]</sup> RESPONDENT did not indicate that it would have been willing to co-operate in the organisation of transport or to bear the resulting costs.

Furthermore, RESPONDENT not only proposed delivery delayed by three months, but could not even guarantee delivery at all. On the contrary, RESPONDENT offered delivery of the remaining 1,200 tons only on the condition of availability.<sup>[121]</sup> In this situation, CLAIMANT had no possibility to predispose production according to the availability of wheat, but would have had to wait until October to know whether RESPONDENT would deliver or not.<sup>[122]</sup>

These consequences would have been a result of RESPONDENT's fundamental breach. RESPONDENT could also foresee such consequences, since it was a regular trader in the international wheat market. Any split up delivery by RESPONDENT, contrary to the terms of the contract, would therefore have constituted a fundamental breach of the entire contract, per Art. 25 and 51 (2) CISG.

***bb.) The consequential loss of confidence underlines the classification of a partial delivery as a fundamental breach***

A party's confidence in a faithful implementation of the contract is one of the most fundamental interests a party may have in any contract.<sup>[123]</sup> A party's conduct must therefore amount to a fundamental breach of contract as soon as it destroys the other party's confidence in the faithful implementation thereof.<sup>[124]</sup> Under the similar provision of Art. 26 ULIS, it has been ruled that a seller who prevents his ability to perform in due time by selling the contractual goods to a third party, commits a fundamental breach of contract.<sup>[125]</sup> Since no compelling reason for partial delivery existed,<sup>[126]</sup> CLAIMANT's confidence in a further faithful implementation of the

contract would have been destroyed by such a partial delivery. CLAIMANT could no longer have reasonably relied on the fact that RESPONDENT would fulfil its contractual obligations, in particular concerning the second shipment.

As a conclusion, the partial shipment would have constituted a fundamental breach by RESPONDENT. Art. 60 CISG did not impose a duty on CLAIMANT neither to accept partial delivery, nor to re-align the letter of credit. CLAIMANT performed its obligations according to the terms of the contract, and did not breach any obligation. Hence, RESPONDENT was not in a position to avoid the contract according to Art. 64 (1) CISG or Art. 72 CISG.

**B. By its final refusal to deliver, RESPONDENT committed a breach of contract per Art. 45 CISG**

On 16 June 1998, RESPONDENT declared that it would not deliver any wheat at all to CLAIMANT.<sup>[127]</sup> This declaration constitutes an anticipatory breach of RESPONDENT's obligation to deliver per Art. 30 and 33 (b) CISG (1.). This breach is also fundamental in the sense of Art. 25 CISG (2.).

**1.) RESPONDENT committed an anticipatory breach of contract by refusing to deliver**

Pursuant to Art. 45 CISG a breach of contract occurs when the seller "fails to perform any of his obligations under the contract or this convention". The CISG does not require any fault by the breaching party.<sup>[128]</sup>

RESPONDENT breached its obligation to deliver by its definite refusal to perform the contract. Such an anticipatory breach of contract is recognised by the CISG in Art. 72.<sup>[129]</sup> Thus, a repudiation of the contract is equivalent, both in nature and consequences, to a breach of contract committed when performance is due.<sup>[130]</sup> Consequently, by its refusal to deliver on 16 June 1998, RESPONDENT breached the contract in the sense of Art. 45 CISG.

**2.) RESPONDENT's breach amounts to a fundamental breach under Art. 25 CISG**

As shown above, a breach is fundamental when it deprives a party substantially of what he is entitled to expect under the contract.<sup>[131]</sup> RESPONDENT's refusal to deliver deprived CLAIMANT entirely of the performance contracted for. Such a refusal constitutes a fundamental breach in the sense of Art. 25 CISG.

In the light of the foregoing arguments, it has been shown that RESPONDENT had no right to avoid the contract with CLAIMANT. Hence, it committed a breach of this contract by its refusal to deliver.

**V. CLAIMANT is entitled to damages of \$ 90,000**

RESPONDENT committed a breach of contract. Hence, CLAIMANT is entitled to damages per Art. 45 and 74 ff. CISG. Under the CISG, the obligation to pay damages arises directly from any objective breach of contract, regardless of fault by the party in breach.<sup>[132]</sup>

CLAIMANT has performed a reasonable cover purchase pursuant to Art. 75 CISG. This entitles it to damages to the amount of \$ 90,000 (A.). Alternatively, CLAIMANT could recover the same amount per Art. 74 CISG (B.). RESPONDENT is not exempt from paying damages (C.). Furthermore, CLAIMANT acted in accordance with any obligation to mitigate the loss (D.). Therefore, CLAIMANT is entitled to the full amount of \$ 90,000. Additionally, RESPONDENT has to pay the corresponding interests (E.).

**A. CLAIMANT is entitled to damages as a consequence of its cover purchase per Art. 45 (1)(b) and 75 CISG**

RESPONDENT refused to perform the contract. Therefore, CLAIMANT could legally proceed to a cover purchase (1.). This purchase was also reasonable. As a result, CLAIMANT may recover its additional expenses of \$ 90,000 (2.).

**1.) RESPONDENT expressly refused to perform the contract**

In its letter dated 16 June 1998, RESPONDENT declared that it would not honour its contractual obligations.<sup>[133]</sup> In this situation, CLAIMANT legitimately proceeded to a cover purchase as provided in Art. 75 CISG.

RESPONDENT may seek to rely upon the condition of a prior avoidance as set out in Art. 75 CISG. Such a reliance is legally unfounded. On the instant facts, RESPONDENT committed a fundamental breach of contract.<sup>[134]</sup> CLAIMANT was therefore entitled to avoid the contract pursuant to Art. 72 (1) and (3) CISG. The avoidance would usually have to be declared in accordance with Art. 26 CISG. This would be to ensure, that parties are certain about the termination of the contract.<sup>[135]</sup> It is clear, however, from a purposive interpretation of this requirement, that it cannot apply to the instant facts. After RESPONDENT's announcement on 16 June 1998 that it was selling the wheat to a third party, it was obvious to both parties that the contract would not be implemented. In the light of its purpose, the declaration of avoidance was therefore unnecessary in this situation. RESPONDENT's refusal to deliver deprived it of any legitimate interest to require a declaration of avoidance by CLAIMANT. In fact it is recognised, that an anticipatory declaration of non-performance by the seller renders the declaration of avoidance unnecessary for the foregoing reasons.<sup>[136]</sup> CLAIMANT can therefore rely on Art. 75 CISG without having declared an avoidance.

**2.) CLAIMANT is entitled to recover its expenses incurred by the reasonable cover purchase**

On 18 June 1998, two days after RESPONDENT's announcement not to deliver, CLAIMANT purchased 6,000 tons of wheat at a price of \$ 75 per ton FOB Equatorian port. The price being the market price on that day, this purchase was reasonable.<sup>[137]</sup> Consequently, CLAIMANT is entitled to recover the difference between the price in the contract with RESPONDENT - \$ 60 per ton - and the price of the substitute transaction \$ 75 per ton. This difference amounts to \$ 90,000.

As CLAIMANT decided to buy the wheat in Equatoriana, it spent \$ 22 per ton for the shipment, instead of \$ 24 per ton it would have had to pay for a transport from Mediterraneo.<sup>[138]</sup> RESPONDENT may seek to deduct the difference of \$ 2 per ton from the total damages. However, such deduction is not recognised by the CISG. Under the CISG, financial advantages of the injured party can never diminish the amount of damages if they result from positive action of the injured party and not directly from the breach of contract.<sup>[139]</sup> On the instant facts, the difference results entirely from CLAIMANT's own initiative and efforts.

Therefore, CLAIMANT can claim the whole amount of \$ 90,000 from RESPONDENT pursuant to Art. 45 (1)(b) and 75 CISG.

**B. Alternatively, CLAIMANT can rely on Art. 74 CISG to claim \$ 90,000**

Having executed a cover purchase, the injured party may rely on Art. 74 or 75 CISG alternatively to calculate the amount of damages.<sup>[140]</sup> Thus, even if Art. 75 CISG should not apply, CLAIMANT can recover damages equalling its foreseeable loss<sup>[141]</sup> suffered as a result of RESPONDENT's breach of contract per Art. 74 CISG. This provision does not even require the breach to be fundamental.<sup>[142]</sup> On the instant facts, CLAIMANT was forced to spend an additional \$ 90,000 in order to replace the wheat RESPONDENT refused to deliver.<sup>[143]</sup> This loss, caused by the difference in price, was a foreseeable consequence of the non-delivery. Consequently, CLAIMANT can alternatively rely on Art. 74 CISG to recover \$ 90,000.

### **C. RESPONDENT is not exempt from paying damages per Art. 79 CISG**

RESPONDENT cannot invoke floods and the Mediterraneo government export regulations as sufficient reason to be exempt from any obligation to pay damages. The requirements of Art. 79 CISG are not met in the instant case. The invoked facts cannot be qualified as an impediment hindering RESPONDENT's performance (1.). Moreover, the purported impediment would not have been beyond RESPONDENT's control (2.). Finally, RESPONDENT could have been expected to overcome the consequences of the purported impediment (3.).

#### **1.) There was no impediment hindering RESPONDENT's performance**

Neither the floods in Mediterraneo nor the governmental restrictions can be qualified as an impediment in the sense of Art. 79 CISG. An impediment is an objective obstacle that hinders performance of the contract.<sup>[144]</sup> It is clear from the construction of Art. 79 (1) CISG that the impediment must be the exclusive or at least decisive cause of the failure to perform.<sup>[145]</sup>

On the instant facts neither the floods nor the governmental restrictions hindered performance of RESPONDENT's obligation to deliver 6,000 tons of wheat to CLAIMANT. After the floods, there was still a sufficient amount of wheat on the Danubian market that would have allowed RESPONDENT to fulfil its obligations resulting from all sales contracts concluded before the occurrence of the floods. This is evidenced by the fact that RESPONDENT was allocated 240,000 tons of wheat under the governmental system of export licenses established on 5 May 1998. This was an amount sufficient to honour all contractual obligations entered into prior to the floods.<sup>[146]</sup>

The export license was a global allocation which did not specify how the allocation was to be used by exporters.<sup>[147]</sup> Therefore, it was solely RESPONDENT's decision how to allocate the wheat. RESPONDENT deliberately entered into new contracts and decided to allocate only 80% to the parties with whom RESPONDENT had concluded a firm contract of sale prior to 17 April 1998.<sup>[148]</sup>

RESPONDENT's obligations resulting from contracts concluded thereafter cannot constitute an impediment in the sense of Art. 79 (1) CISG either, since it was RESPONDENT's decision to enter into these contracts. An impediment can only be an incident exterior to a party's activity.<sup>[149]</sup> Even after having concluded new contracts, it remained RESPONDENT's own decision not to honour its contractual obligations towards CLAIMANT, since all new contracts were concluded under the condition of availability.<sup>[150]</sup> Therefore, RESPONDENT could have performed the obligations resulting from the contracts concluded before 17 April 1998 without violating the new contracts.

As a result, neither the floods, the governmental license system nor the other contracts entered into by RESPONDENT hindered it to perform the contract with CLAIMANT.

#### **2.) The purported impediment would not have been beyond RESPONDENT's control**

Should this Tribunal find that the facts invoked by RESPONDENT constitute an impediment in the sense of Art. 79 (1) CISG, it would not have been beyond RESPONDENT's control. The requirement "beyond control" per Art. 79 (1) CISG is not connected with the issue of the ability of a party to prevent the impediment. Furthermore, fault is of no relevance.<sup>[151]</sup> On the contrary, the requirement is based on the allocation of spheres of risk between the parties.<sup>[152]</sup> In order to determine the parties' respective spheres of risk, utmost importance is to be given to the parties' agreement.<sup>[153]</sup> On the instant facts, the floods and governmental export restrictions in Danubia fall into RESPONDENT's sphere of risk.

RESPONDENT and CLAIMANT concluded a sales contract for wheat which is a generic good. They did not specify its origin. In such a case, the seller bears the risk to procure the agreed quantity of goods, at least as long as any possibility to procure the goods remains.<sup>[154]</sup> Therefore, the floods fell into the sphere of risk of RESPONDENT.

RESPONDENT also had to bear the risk of the Danubian export restrictions. The parties had agreed on the INCOTERM clause FOB.<sup>[155]</sup> This clause demands that the seller take care of all export formalities.<sup>[156]</sup> Consequently, the parties allocated the export risk to the seller, RESPONDENT, by reference to the FOB clause.<sup>[157]</sup>

The impediments alleged by RESPONDENT would therefore not have been beyond its control.

#### **3.) RESPONDENT could have been expected to overcome the purported impediments**

Finally, RESPONDENT would have been able and could have been expected, to overcome the consequences of the floods and the governmental export restrictions.

CLAIMANT and RESPONDENT concluded a contract on the sale of standard feed wheat. They did **not** specify that only Danubian wheat should be delivered. If such a generic good is the object of a sale, Art. 79 CISG does **not** apply whenever the seller has the possibility to procure goods in replacement on the market.<sup>[158]</sup> RESPONDENT always had the possibility to procure wheat in other countries. This is evidenced by the fact that CLAIMANT could purchase wheat in replacement in Equatoriana.<sup>[159]</sup> It would not have been unreasonable to expect RESPONDENT to procure wheat in another country, since such purchase would not have violated the Danubian export license system. The license system concerned exclusively the Danubian wheat market.<sup>[160]</sup>

RESPONDENT alternatively could have delivered to CLAIMANT the wheat it decided to sell to other regular customers after the occurrence of the floods.<sup>[161]</sup> It is evident that this would not have been overly burdensome to RESPONDENT. Firstly, it is not established that RESPONDENT actually would have lost any good will.<sup>[162]</sup> Moreover, not honouring obligations under firm contracts - as done by RESPONDENT - did certainly result in a greater loss of good will than would have been the case by not concluding new contracts. Hence, RESPONDENT could reasonably have been expected to overcome the consequences of any purported impediment. The prerequisites of Art. 79 CISG are not met.

RESPONDENT cannot invoke Art. 80 CISG as an exemption ground either, since CLAIMANT had no duty to accept the partial delivery proposed by CLAIMANT.<sup>[163]</sup> Consequently, CLAIMANT who insisted on the delivery of 6,000 tons of wheat, did not cause the non-performance of RESPONDENT's obligation to deliver in the sense of Art. 80 CISG.

No other grounds for an exemption from damages are recognised under the CISG.<sup>[164]</sup> Thus, RESPONDENT is not exempt from paying damages.

#### **D. CLAIMANT acted in accordance with any duty to mitigate loss according to Art. 77 CISG**

RESPONDENT cannot invoke Art. 77 CISG to reduce the amount of damages. A duty to mitigate loss arose at the earliest, when CLAIMANT received RESPONDENT's refusal to deliver (1.). CLAIMANT complied with this duty (2.). Even if the Tribunal should assume that a duty to mitigate existed at an earlier point, CLAIMANT did not violate such duty (3.).

##### **1.) A duty to mitigate loss arose at the earliest, when CLAIMANT received RESPONDENT's refusal to deliver**

A contracting party can only be under an obligation to mitigate loss, if it is clear that the other party will commit a breach of contract.<sup>[165]</sup> Before this is clear, any contracting party may rely on the performance of the contract and does not need to search for alternatives. Accordingly, the *Hanseatisches Oberlandesgericht Hamburg* held that in the case of a breach of contract by anticipatory repudiation, a duty to mitigate loss in the sense of Art. 77 CISG may arise at the earliest, when the injured party receives the refusal to honour the contract.<sup>[166]</sup> This decision is of direct relevance to the instant facts.

Before RESPONDENT refused to deliver in his letter of 16 June 1998,<sup>[167]</sup> it was not clear to CLAIMANT that the contract of sale would not be implemented. RESPONDENT's proposal to split up delivery did not allow the conclusion that RESPONDENT would actually breach the contract. CLAIMANT positively knew that RESPONDENT had been allocated a sufficient amount of wheat for all contracts concluded before 17 April 1998.<sup>[168]</sup> In the light of this knowledge, it was reasonable for CLAIMANT to insist on the implementation of the contract of sale according to its initial terms. CLAIMANT could be aware of a serious danger to the implementation of the contract, only when he received RESPONDENT's definite refusal to deliver.<sup>[169]</sup>

Consequently, the duty to mitigate any potential loss arose no earlier than 16 June 1998.

##### **2.) CLAIMANT complied with its duty as of 16 June 1998**

Having received the declaration of non-performance, CLAIMANT immediately took adequate measures and engaged in a cover purchase on the best terms available on the market.<sup>[170]</sup> At this moment, CLAIMANT had not even the possibility to accept any wheat from RESPONDENT, since RESPONDENT had allocated the total amount of its wheat to other customers.<sup>[171]</sup> RESPONDENT clearly regarded the contractual relationship terminated. Consequently, CLAIMANT took every possible step to mitigate loss, as soon as its duty arose.

##### **3.) In the alternative, CLAIMANT did not violate any duty to mitigate loss at an earlier stage**

Should the Tribunal assume that CLAIMANT's duty to mitigate potential loss arose as early as he received RESPONDENT's first request to modify the contract, CLAIMANT did not violate this duty.

The duty to mitigate loss could not have required CLAIMANT to accept RESPONDENT's delivery of only 4,800 tons of wheat and procure the remaining 1,200 tons elsewhere. Mitigation of loss does not include the duty to renounce the full implementation of the contract.<sup>[172]</sup> It has been shown above that the CISG does not impose any obligation on CLAIMANT to accept the 4,800 tons of wheat offered by RESPONDENT.<sup>[173]</sup> Constraining such an obligation under Art. 77 CISG would be contradictory to the conclusion as drawn above.

This result is further reinforced by a purposive interpretation of Art. 77 CISG. The purpose of this provision is to prevent a party from paying higher damages than its breach of contract inevitably caused to the other party.<sup>[174]</sup> Thus, Art. 77 CISG protects the party in breach from any financial detriment that could have been avoided by the injured party. On the instant facts, the acceptance of 4,800 tons of wheat by CLAIMANT would not have affected the economic situation of RESPONDENT. If CLAIMANT had accepted the 4,800 tons at \$ 60 per ton from RESPONDENT and bought only 1,200 tons in replacement, the recoverable damages would have amounted to \$ 18,000.<sup>[175]</sup>

In the present situation, RESPONDENT sold the 4,800 tons at \$ 75 per ton to a third party and made a supplementary gain of \$ 72,000.<sup>[176]</sup> Although CLAIMANT's damages amount to \$ 90,000,<sup>[177]</sup> RESPONDENT's financial detriment is once again only \$ 18,000. Consequently, the acceptance of 4,800 tons of wheat at \$ 60 per ton would not have improved RESPONDENT's financial position. Hence, the duty to mitigate loss could not require CLAIMANT to accept 4,800 tons at \$ 60 per ton from RESPONDENT. CLAIMANT complied with its duty to mitigate loss by making the cover purchase at the best conditions available.

#### **E. CLAIMANT is entitled to interests on the sum of \$ 90,000 pursuant to article 78 CISG**

Art. 78 CISG grants interests on any sum in arrears, including due damages.<sup>[178]</sup> Damages become due as soon as the loss arises whether they constitute a liquidated sum or not.<sup>[179]</sup> On the instant facts CLAIMANT suffered a loss of \$ 90,000 when he made the replacement purchase on 18 June 1998.<sup>[180]</sup> Consequently, the allowable damages became due on 18 June 1998 and RESPONDENT owes interests on the sum of \$ 90,000 as of 18 June 1998.

#### **VI. Costs of the arbitration**

According to Art. 28.4 of the LCIA Rules, the Tribunal should order RESPONDENT to bear the costs of arbitration as well as any other legal costs.

#### **VII. Request for relief**

In view of the above submissions, may it please the Tribunal

- to declare that Mr. Dean's written statement is of full evidential value under the LCIA Rules,
- to declare that an arbitration agreement has been concluded by CLAIMANT and RESPONDENT,

- to declare that a contract of sale has been concluded between the parties under the CISG,
- to declare that RESPONDENT breached this contract by its declaration not to honour its contractual obligations,
- to allow damages of \$ 90,000 and interests on this sum as of 18 June 1998,
- to order RESPONDENT to bear all costs of arbitration and any other legal costs.

For Feed Processing Corp.

(signed) \_\_\_\_\_, 3 December 1999

Attorneys

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#### FOOTNOTES

1. Claimant's exhibit No. 12.
2. Procedural Order No. 1 (5).
3. By agreeing on an arbitration clause incorporating the LCIA Rules (see Claimant's exhibit No. 1 and infra II), by the Request for Arbitration of 25 May 1999 and by the Response of 28 June 1999, III No. 6.
4. By requesting arbitration before the LCIA and submitting the statements of claim and defence without reference to any other procedural rules.
5. On 18 May 1999, see Claimant's exhibit No. 12 and Procedural Order No. 2, Clarification 36.
6. Art. 20.6 LCIA Rules states that "it shall not be improper for a party to interview any witness or potential witness for purpose of presenting his testimony in written form or producing him as an oral witness."
7. ICC Procedural Order 7170/1992, ICC Procedural Decisions, p. 55.
8. Art. 20.7 LCIA Rules states that the fact that a witness is a present or former employee of one of the parties does not prejudice his use as a witness.
9. Reference is made to Art. 20.4 **2nd sentence**: "If the Arbitral Tribunal orders that other party to produce the witness and the witness fails to attend the oral hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony (or exclude the same altogether) as it considers appropriate in the circumstances of the case."
10. Art. 20.4 LCIA Rules: "If the Arbitral Tribunal orders that other party to produce the witness[...]" (emphasis added).
11. Tucker v. People, Supreme Court of Colorado, 19 Aug 1957, 319 P.2d 983 (986); OLG Frankfurt, 23 Sept. 1957, NJW 1957, p. 1725; the equivalent term excusing the non-appearance of witnesses is "motif légitime" in Art. 207 French NCPC, "genügende Entschuldigung" in Art. 381 German ZPO and "causa justa" in Art. 273 Spanish CPC.
12. Black's Law Dictionary, "Good Cause", p. 692.
13. Oran's Dictionary of the Law, "Good Cause", p. 189.
14. OLG München, 12 Nov. 1956, NJW 1957, p. 306.
15. Mr. Dean has been dismissed by CLAIMANT on 31 August 1999, see Procedural Order No. 2, Clarification 34.
16. Cf. Procedural Order No. 2, Clarification 35.
17. Procedural Order No. 1 (3) states "Mr. Dean was involuntarily terminated from his position [...] for reasons unrelated to this dispute."; see also Procedural Order No. 2, Clarification No. 34.
18. ICC Procedural Decisions, p. 105; ICCA Report, p. 123; see also Art. 8 (1) IBA Rules on the Taking of Evidence in International Commercial Arbitration (as adopted on 1 June 1999): "the arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness [...], if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative [...]"
19. Redfern/Hunter-Redfern, p. xiii.
20. Knof, p. 70: "There is a long tradition in international litigation to replace evidence given by witnesses during the oral trial by written statements signed by the witnesses." Ward, p. 14: "Arbitration proceedings are conducted principally through written evidence rather than oral testimony." Ceccon, p. 17: "Evidence, usually written, but occasionally oral, is submitted to the arbitrator."
21. OLG Frankfurt, 29 Jun. 1989, RIW 1989, p. 911 (914); Art. 25 (5) UNCITRAL Arbitration Rules (also used in this form for the Iran-US-Claims-Tribunal); Art. 20 (5) AAA International Arbitration Rules (as effective on 1 April 1997), Rule 36 (a) ICSID Rules of Procedure for Arbitration Proceedings.
22. Cf. supra I A.
23. The Tribunal "has the discretion to allow, refuse or limit the appearance of witnesses" and is under the obligation to avoid "unnecessary delays or expense" and to provide "efficient means" for the resolution of the dispute.

24. *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier*, US Circuit Court of Appeals, 2nd Cir., 508 F.2d 969 (975).
25. *OLG Hamburg* 27 July 1978, YCA 1979, p. 266; *Standard Tankers (Bahamas), Ltd v. Motor Tank Vessel*, US District Court, E. D. of North Carolina, 6 Sept. 1977, 438 F.Supp 153; *van den Berg*, p. 309.
26. *Standard Tankers (Bahamas), Ltd v. Motor Tank Vessel*, US District Court E. D. of North Carolina, 6 Sept. 1977, 438 F.Supp 153; *Laminoirs-Trefileries-Cableries de Lens S.A. v. Southwire Company*, US District Court, N. D. of Georgia, 18 Jan. 1980, 484 F.Supp 1063 (1066); *van den Berg* p. 307-309.
27. *BGH*, 8 Oct. 1959, BGHZ 31, p. 43 (46); *OLG Frankfurt*, 23 June 1989, RIW 1989, p. 911 (914).
28. *Fouchard/Gaillard*, p. 961; *Born*, p. 90 and 545; *Lowenfeld*, p. 379; *Schlosser*, p. 598; *Berger*, p. 470; *Schütze*, No. 239 (p. 172).
29. Art. 14.1 i LCIA Rules refers to the duty of the tribunal of "giving each [party] a reasonable opportunity of putting its case"; Art. 18 UML states that "each party shall be given a full opportunity of presenting its case".
30. *Black's Law Dictionary*, "due process of law", p. 500.
31. *BGH* 19 Sept. 1977, RIW 1978, p. 410 (411); *BGH* 11 Nov. 1982, NJW 1983, p. 867; *COFINCO, Inc. v. Bakrie & Bros, N. V.*, US District Court S.D. of New York, 11 June 1975, 395 F.Supp. 613 (616); *Cobec Brazilian Trading etc. v. Isbrandtsen*, US District Court S.D. of New York, 15 Dec. 1980, 524 F.Supp 7 (10). The principle is set out in: Art. V (1) (b) NYConv; Art. 36 (1)(a)(ii) UML; Art. 1502 No. 4 French NCPC; Art. 190 (2) lit. d Swiss GIPR; combination of Art. 33 (1) lit. a and Art. 68 (2) lit. g/i England Arbitration Act 1996; § 1044 (2) No. 4 German ZPO; Sec. 12 (a)(4) US Uniform Arb. Act; § 595 (1) No. 2 Austrian ZPO; cf. Art. 103 (2) German Constitution.
32. *Supra* I B 2.
33. *Filanto, S.p.A. v. Chilewich International Corp.*, U.S. District Court, S.D. of New York, 14 Apr., 1992, 789 F. Supp. 1229 (1237); *Schlechtriem-Junge*, Art. 8, No.10 *Redfern/Hunter*, p.150. Any other recognised approach in order to determine the law applicable to the arbitration agreement would lead to the application of Danubian Law including the CISG, since the parties have chose Danubian law and the place of the arbitration is in Danubia; cf. *Berger*, p. 115; *van den Berg*, p. 282; *Schlosser*, p. 176, 184; *Rubino-Sammartano*, p. 143.
34. As evidenced by Claimant's exhibits No. 12 and 13.
35. Claimant's exhibit No. 12 and Respondent's exhibit No. 1 respectively.
36. Claimant's exhibit No. 12: Telling Mr. Stern: "I [Mr. Dean] was now the responsible person [at Claimant]".
37. Cf. *Schlechtriem-Schlechtriem*, Art. 14, No. 4: "An offer is also capable of acceptance if 'a reasonable person' [...] would have understood the necessary minimum content to have been expressed in sufficiently definite terms (Art. 8 (2))".
38. Respondent's exhibit No. 1: "[...] telling me that the purchase was for Feed Processing Corp.[Claimant]".
39. *Ibid*: "Since Food Imports purchased both for their own account and to procure goods for their customers, it was not unusual for Mr. Dean to tell me that it was one of his customers [e.g. Claimant] that wished the wheat."
40. *Ibid*: "He also mentioned that [...] Feed Processing Corp. [...] would be ceasing to use the services of Food Imports."
41. *Ibid*: "Although I do not recall that he said so specifically[...]"
42. *Supra* a.
43. Cf. Claimant's exhibit No. 2 and Respondent's exhibit No. 2 respectively.
44. Cf. Respondent's exhibit No. 2.
45. Procedural Order No 2, Clarification No 8.
46. Claimant's exhibit No. 3.
47. Claimant's exhibit No. 5.
48. As evidenced by Claimant's exhibit No. 8.
49. Claimant's exhibit No. 13.
50. Claimant's exhibit No. 8 and 10 respectively.
51. Respondent's exhibit No. 2.
52. *Supra* a.
53. *Framatome*, Apr.1982, YCA 1983, p. 94; *Berger*, p. 379; *Black's Law Dictionary*, p. 551.
54. *OLG Hamburg*, 28 Feb. 1997, AZ 1 U 167/95, online-database University of Freiburg; *Schlechtriem-Stoll*, Art. 75, No. 5; *Bianca/Bonell-Bonell*, Art. 7, No. 2.4.1ff.; *Karollus*, p. 12; *Stoll, RabelsZ* (52) 1988, p. 635; *Herber/Czerwenka*, Art. 8, No. 11; *v. Caemmerer/Schlechtriem-Junge*, Art. 8, No. 6; *Enderlein/Maskow*, Art. 8, No. 11; *Bianca/Bonell-Farnsworth*, Art. 8, No. 2.6; *Reinhart*, art. 8, No. 5; *Huber, RabelsZ* (43) 1979, p. 430; *Honsell-Melis*, Art. 8, No. 14.
55. As shown under a.

56. Respondent's exhibit No. 2.
57. Cf. case *Framatome in YCA 1983*, p. 94 (104): A party should not "be permitted to allege the initial invalidity of a contract after [...] a period of performance" since that party "considered the contract perfectly valid and binding [...], at least until the occurrence of the dispute".
58. *Herber/Czerwenka*, Vor Art. 14, No. 16; *Schlechtriem-Schlechtriem, Intro to Arts. 14-24*, No. 2; *Honnold*, No. 132.1, 133; *Schlechtriem, UN-Kaufrecht*, No. 69.
59. *Filanto S.p.A. v. Chilewich International Corp.*, U.S. District Court, S.D. of New York, 14 Apr. 1992, 789 F. Supp., 1229 (1239); *Framatome*, Apr. 1982, YCA 1983, p. 94 (104); *OLG München*, 8 Mar. 1995, in *Pace database*.
60. As set out in a. and b.
61. LCIA Rules Preamble: „Where any agreement, submission or reference provides **in writing** and in whatsoever manner for arbitration [...] (emphasis added).
62. Claimant's exhibit No.2.
63. *Holtzmann/Neuhaus*, p. 260, 262; *Granzow*, p. 84, 86, 89; *Hußlein-Stich*, p. 39; *Broches*, p. 39 ff.
64. This possibility is at least envisaged by *Broches* on a literal interpretation of the NYConv, *Broches*, p. 41; cf. also *Granzow*, p. 34 in footnote 5.
65. Art. VII (1) NY Conv gives priority to less strict rules; cf. *BGH*, 3 Dec. 1992, NJW 1993, p. 1798; *van den Berg*, p. 82 ff., 86 ff.
66. *Berger*, p. 111 ff.
67. *Israel Chemicals & Phosphates v. N.V. Algemeene Oliehandel, Rechtsbank Rotterdam*, 26 Jun. 1970, *Nederlandse Jurisprudentie* 1970, No. 470; cf. also *Sté Sorvia v. Weinstein International Disc. Corp.*, Court of Appeal Paris, 25 Mar. 1983, *Revue de l'arbitrage* 1984, p. 363 ff.; ICC Interim Award No. 5065 of 1986, *Clunet* 1987, 1039 (1042 ff.).
68. Cf. *supra* II A 1 and II A 2 c.
69. *Tradax Export S. A. v. AMOCO Iran Oil Comp.*, SchwBG, 7 Feb. 1984, YCA 1986, 532; *MiKo-Förschler*, § 125 BGB, No. 3.
70. Procedural Order No. 2, Clarification No. 6; Claimant's exhibit No. 2.
71. *Granzow*, p. 88.
72. I.e. the requirement of an exchange of documents containing each party's written assent; cf. *Holtzmann/Neuhaus*, p. 260, 279.
73. Cf. *supra* II A 2 b.
74. Cf. *supra* II A 2 c.
75. *Tribunal of Strasbourg*, 9 Oct. 1970, YCA 1977, p. 244; *Rubino-Sammartano*, p.122; *Holtzmann/Neuhaus*, p. 264; *Berger*, p. 111 ff.; *Lindacher*, p. 167 (173).
76. *Société Bomar Oil N.V. v. E.T.A.P.*, Court of Appeal Paris, 20 Jan. 1987, *Clunet* 1987, 934; 5th Working Group Report (A/CN. 9/246 para. 19), Seventh Secretariat Note (A/CN. 9/264 para. 8) in: *Holtzmann/Neuhaus*, p. 285 (291).
77. *Tradax Export S. A. v. AMOCO Iran Oil Comp.*, SchwBG, 7 Feb. 1984, YCA 1986, 532; *BGH*, 3 Dec. 1992, NJW 1993, p. 1798; *Schlosser*, No. 379; *Lindacher*, p. 167 (173).
78. Procedural Order No. 2, Clarification No. 6; Claimant's exhibit No. 2.
79. *Isovers v. Dow Chemical*, ICC Interim Award, 23 Sept. 1982, No. 4131, 1982, ICC Awards I, p. 146 (149 f.); *Society of Maritime Arbitrators, INC., Partial Final Award No. 1510*, 28 Nov. 1980, YCA 1982, p. 151 (153); ICC Award No. 2375, 1975, *Clunet*, p. 973 (974, 977); cf. also *Translation Systems Inc. v Applied Technology Ventures et. al.*, U.S. District Court Maryland, 30 Mar.1983, 559 F. Supp. 566 (567); *U.S. v. Scophony Corp. of America*, Supreme Court, 26 Apr. 1948, 333 U.S. 795 (816); *Born, International Litigation*, p. 156.
80. *Society of Maritime Arbitrators, INC., Partial Final Award No. 1510*, Nov. 28, 1980, YCA 1982, p. 151 (153);
81. *Isovers v. Dow Chemical*, ICC Interim Award, 23 Sept. 1982, No. 4131, 1982, ICC Awards I, p. 146 (150); *Arbitral Award No. 1434*, 1975, *Clunet* 1976, p.978 (984)
82. Claimant held 51% of the shares in IMPORTS and had 3 out of 9 Board Members, cf. Claimant's exhibit No. 13.
83. Claimant's exhibit No. 13.
84. *ibid.*
85. Claimant's exhibit No. 13.
86. Respondent's exhibit No. 1.
87. ICC Award No. 2375, 1975, *Clunet* 1976, p. 973 (974, 977).
88. Sale of the stock in IMPORTS held by CLAIMANT was completed on 28 Feb. 1998, cf. Claimant's exhibit No. 13.
89. *Supra* II.

90. *Isovers v. Dow Chemical*, ICC Interim Award, 23 Sept. 1982, No. 4131, 1982, ICC Awards I, p. 146 (150) infers from the essential role that a non-signatory company plays in the implementation of a contract that it is party to both the arbitration agreement and the main contract itself.
91. Claimant's exhibit No. 11: "We are taking steps to re-allocate to our other customers the standard feed wheat that we would otherwise have shipped to you [i.e. CLAIMANT];[...] we hope that this break in our relationship [...]"
92. Art. 72 CISG allows avoidance of a contract if it is clear that the other party will commit a fundamental breach.
93. The obligation to take delivery was only due in July, cf. Claimant's exhibit No. 2 and Respondent's exhibit No. 2, respectively.
94. Claimant's exhibit No. 6, 8.
95. Claimant's exhibit No. 5, 7, 8, 10.
96. Claimant's exhibit No. 5.
97. Claimant's exhibit No. 6.
98. *Dubrovnik Lectures*, p. 64: "International trade law is based on three fundamental propositions: [...] (ii) *pacta sunt servanda*".
99. *Schlechtriem-Huber*, Art. 28, No. 2.
100. *Bianca/Bonell-Will*, Art. 45, No. 2.1.2.; *Reinhart*, Vor Art. 45, No. 2; *Staudinger-Magnus*, Art. 45, No. 1; *Neumayer/Ming*, Art. 45, No. 1.
101. *Schlechtriem-Stoll*, Art. 79, No. 39.
102. Art. 79 and 80 CISG govern exclusively the issue of exemption under the CISG. Any other principles as e.g. hardship cannot be invoked. *Tribunale Civile di Monza*, 14 Jan. 1993, *Pace law database*; *Audit No. 182*; *Bianca/Bonell-Tallon*, Art. 79, No. 3.1.2.
103. Claimant's exhibits No. 6, 9.
104. *Schlechtriem-Hager*, Art. 60 No. 3; cf. also *Reinhart*, Art. 60, No. 7.
105. *Schlechtriem-Hager*, Art. 60 No. 3; cf. also *Bianca/Bonell-Maskow*, Art. 53, No. 3.2.2.; *Wiegand*, p. 148.
106. Even if the parties have agreed on a FOB clause, Respondent would have had to bear the cost of transporting the wheat back from the Danubian port to his storage facility pursuant to Art. 74 CISG.
107. *Wiegand*, p. 148; *Schlechtriem-Hager*, Art. 60, No. 3; cf. also *Galston/Smit-Tallon*, p. 7-2.
108. This aspect will be developed in detail in the context of exemption per Art. 79 CISG, *infra V*.
109. Respondent's contracts concluded after the occurrence of the floods were on the condition of availability.
110. Claimant's exhibit No. 4.
111. Since Respondent had not concluded firm contracts with these third parties, but concluded on condition of availability, it would not have to breach those contracts to perform its obligations towards Claimant.
112. *Honsell-Schmyder/Straub*, Art. 60, No. 35; *Bianca/Bonell-Maskow*, Art. 53, No. 3.2.1.ff; *Enderlein/Maskow/Strohbach*, Art. 60, No. 2.1.; *Herber/Czerwenka*, Art. 53, No. 11; *Karollus*, p. 174 f; *Piltz*, § 4, No. 168; *Schlechtriem-Hager*, Art. 60, No. 3; *Staudinger-Magnus*, Art. 60, No. 20.
113. Claimant's exhibit No. 5: "We hope and anticipate that we may receive an additional quota in October [...]"
114. *Bianca/Bonell-Will*, Art. 25, No. 2.1.1.2; *Staudinger-Magnus*, Art. 25, No. 11.
115. *Staudinger-Magnus*, Art. 25, No. 9.
116. *Schlechtriem-Schlechtriem*, Art. 25, No. 9; *Staudinger-Magnus*, Art. 25, No. 13.
117. Claimant's exhibit No. 2: "[...] in derogation of the Standard Conditions, the letter of credit will provide for no partial shipments."
118. *Honsell-Karollus*, Art. 25 No. 22.
119. This could even constitute in itself a fundamental breach: cf. *Schlechtriem-Huber*, Art. 31, No. 73b.
120. *Procedural Order No. 2, Clarification 51*: Costs for the transport of 6,000 tons are \$ 144,000; costs for transporting 4,800 tons and 1,200 tons in separate deliveries would have arisen to \$ 176,600.
121. Claimant's exhibit No. 5.
122. This could also constitute in itself a fundamental breach: cf. *Honsell-Karollus*, Art. 25, No. 14.
123. *Galston/Smit-Tallon*, p. 7-7.
124. *Honsell-Karollus*, Art. 25, No. 23; *von Caemmerer, FS Coing*, S. 52; *OLG Frankfurt 17 Sep.1991*, *NJW* 1992, 633; cf. also *Schlechtriem-Huber*, Art. 48, No. 17; *Karollus*, *ZIP* 1993, p. 497.

125. *LG Düsseldorf*, 17 Nov. 1983, in *Schlechtriem/Magnus, Rechtsprechungsreport* Art. 26 No. 6; cf. to the comparability of the respective provision of the *ULIS Staudinger-Magnus*, Art. 25, No. 3.
126. *Infra V C 1*.
127. *Claimant's exhibit No. 11*.
128. *Bianca/Bonell-Will*, Art. 45, No. 2.1.2.; *Reinhart, Vor Art. 45*, No. 2; *Staudinger-Magnus*, Art. 45, No. 1; *Neumayer/Ming*, Art. 45, No. 1.
129. *Schlechtriem-Stoll*, Art. 72, No. 4; *Bianca/Bonell-Bennett*, Art. 72, No. 1.1.
130. *Schlechtriem, JZ* 1988, p. 1045.
131. *Supra I c aa*.
132. *Schlechtriem-Stoll*, Art. 74, No. 7; *Reinhart, vor Art. 74*, No. 1; *Kritzer*, p. 579; *Kranz*, p. 190; *Herber/Czerwenka*, Art. 74, No. 3.
133. *Supra IV B II; Claimant's exhibit No. 11*.
134. *Supra IV C: Respondent refused to deliver in his letter dated 16 June 1998 (Claimant's exhibit No. 11)*.
135. *Secretariat Commentary*, Art. 24, No. 1 f.; *Bianca/Bonell-Date-Bah*, Art. 26, No. 2.3; *Schlechtriem-Leser*, Art. 26, No. 6; *Ziegler*, p. 164; *Piltz*, § 5, No. 428 f.; *Staudinger-Magnus*, Art. 26, No. 7; *Bianca/Bonell-Knapp*, Art. 75, No. 2.1.
136. *OLG Hamburg*, 28 Feb. 1997, *AZ 1 U 167/95*, online-database University of Freiburg; *Schlechtriem-Stoll*, Art. 75, No. 5; *Staudinger-Magnus*, Art. 75, No. 8; *Honsell-Schönle*, Art. 85, No. 22; *Stoll, RabelsZ* 52 (1988), 635; *Weber*, p. 201.
137. *Compare for a reasonable cover purchase at market price: Staudinger-Magnus*, Art. 75, No. 16; *Kranz*, p. 220; *Sheng-Lin Jan*, p. 288.
138. *Procedural Order No. 2, Clarification No. 51/52*.
139. *Soergel-Lüderitz*, before Art. 82 EKG, No. 7; *Schlechtriem-Stoll*, Art. 74, No. 32. The following example where saved expenses would have to be deducted, may illustrate **the contrast** to the instant facts: A concludes 2 week lease agreement with B for a specialist piece of machinery. B needs to conclude contracts with specialist workers to operate machine. Before date of delivery machine is destroyed. No replacement is available. B has concluded no employment contracts with workers. Since machine is destroyed, B no longer needs to employ workers and saves expenses. This saving results directly from the breach of contract, since it did not result from conduct taken on B's own initiative.
- In contrast* to this, it was CLAIMANT's initiative to organise the new transport from *Mediterraneo* at a lower price.
140. *ICC Arbitral Award No. 6281 (1989) in ICC Awards II*, p. 394 (399); *Secretariat Commentary*, Art. 71 E78 (=Art. 75), No. 6 and Art. 70 E 78 (=Art. 74), No. 2; *Neumayer/Ming*, Art. 75, No. 2; *Enderlein/Maskow*, Art. 74, No. 1; *Bianca/Bonell-Knapp*, Art. 74, No. 1.4; *Kranz*, p. 221/222; *Piltz*, § 5, No. 432; *Ryffel*, p. 73.
141. *Jurisclasseur fascicule 565-A-5 No. 140; Honsell-Schönle*, Art. 74, No. 1; *Herber/Czerwenka*, Art. 74, No. 10; *Reinhart*, Art. 74, No. 2; *Audit*, p. 163; *Kranz*, p. 210 ff.
142. *Honnold*, Art. 45, No. 276; *Bianca/Bonell-Will*, Art. 45, No. 2.1.2; *Staudinger-Magnus*, Art. 45, No. 10; *Heilmann*, p. 553.
143. *Supra V A 2*.
144. *ICC award No. 6281 (1989) in ICC-Awards II*, p. 394 (398); *OLG Hamburg*, 28 Feb. 1997, *AZ 1 U 167/95*, online-database University of Freiburg; *Bianca/Bonell-Tallon*, Art. 79, No. 2.6.1 / 2.6.2; *Staudinger-Magnus*, Art. 79, No. 16; *Neumayer/Ming*, Art. 79, No. 2; *Morscher*, p. 133; *Keil*, p. 33; *ICC award No. 7197 (1992) in ICC-Awards III*, p. 501 (508) which requires that performance is impossible due to the impediment.
145. *Bianca/Bonell-Tallon*, Art. 79, No. 2.6.6; *Heuzé*, No. 457; *Schlechtriem-Stoll*, Art. 79, No. 26.
146. *Cf. Claimant's Statement of case No. 5; Claimant's exhibits No. 5, 6, 7; Procedural Order No. 2, Clarification No. 50*.
147. *Cf. Procedural Order No. 2, Clarification No. 23*.
148. *Cf. Claimant's exhibits No. 5 and 7 and Procedural Order No. 2, Clarification No. 50*.
149. *Staudinger-Magnus*, Art. 79, No. 16; *Bianca/Bonell-Tallon*, Art. 79, 2.6.2; *Honsell-Magnus*, Art. 79, No. 13; *Neumayer/Ming*, Art. 79, No. 3; *Audit* No. 182; *Botzenhardt*, p. 72; *Ziegler*, p. 219; *Heilmann*, p. 626; *Ryffel*, p. 90.
150. *Cf. Procedural Order No. 2, Clarification No. 50*.
151. *Honsell-Magnus*, Art. 79, No. 10; *Enderlein-Maskow*, Art. 79, No. 4.1; *Schlechtriem, UN-Kaufrecht*, No. 288.
152. *Herber/Czerwenka*, Art. 79, No. 2; *Keil*, p. 33; *Ziegler*, p. 217; *Schlechtriem, JZ* 1988, 1047.
153. *OLG Hamburg*, 28 Feb. 1997, *AZ 1 U 167/95*, online-database University of Freiburg; *Kranz*, p. 197; *Morscher*, p. 158; *Ziegler*, p. 219.
154. *LG Heidelberg*, 30 Jan. 1979, concerning the similar provision of Art. 74 EKG, in: *Schlechtriem/Magnus*, Art. 74, No. 4; *Schlechtriem-Stoll*, Art. 79, No. 31 *Keil*, p. 125; *Kranz*, p. 199; *Heilmann*, p. 628; *Jan*, p. 314; *Huber, Haftung des Verkäufers*, p. 19.
155. *Claimant's exhibit No. 2*.
156. *Bredow/Seiffert, FOB* No. 6.

157. Cf. Morscher, p. 158 f. who gives the following example: A party who has to take care of the export formalities according to an agreed INCOTERM is not exempt from its contractual obligations in the case where an export license system is initiated after the conclusion of the contract and the party does not get the license it would need.

158. LG Heidelberg, 30 Jan. 1979, concerning the similar provision of Art. 74 EKG, in: Schlechtriem/Magnus, Art. 74, No. 4; Bianca/Bonell-Tallon, Art. 79, No. 2.6.5; Schlechtriem-Stoll, Art. 79, No. 31.

159. Cf. Claimant's Request for Arbitration III No. 7.

160. Cf. Claimant's exhibit No. 3: "[...] the amount of standard feed wheat that will need to be reserved for the domestic [Danubian] market[...].

161. Supra V C 1.

162. Procedural Order No. 2, Clarification No. 43.

163. Supra IV.

164. Art. 79 and 80 CISG govern exclusively the issue of exemption under the CISG. Any other principles as e.g. hardship cannot be invoked. Tribunale Civile di Monza, 14 Jan. 1993, Pace law database; Audit No. 182; Bianca/Bonell-Tallon, Art. 79, No. 3.1.2.

165. Secretariat Commentary, Art. 73, No. 4; Herber/Czerwenka, Art. 77, No. 7; Neumayer/Ming, Art. 77, No. 1; Heilmann, p. 612; Schlechtriem-Stoll, Art. 77, No. 6.

166. OLG Hamburg, 28 Feb. 1997, AZ I U 167/95, Online-Database, University of Freiburg.

167. Cf. Claimant's exhibit No. 11.

168. Claimant knew this from the exchange of the letters dated 20 and 21 May 1998; Claimant's exhibit No. 6 and 7; see also Procedural Order No. 2, Clarification No. 50.

169. Cf. Claimant's exhibit No. 11.

170. Cf. Claimant's Request for Arbitration No. 7 and Procedural Order No. 2, Clarification No. 47: 2 days after Respondent's refusal Claimant performed a cover purchase per \$ 75 per ton. This was the market price.

171. Cf. Claimant's exhibit No. 11.

172. Schlechtriem-Stoll, Art. 77, No. 10.

173. Supra IV.

174. Homold, Art. 77, No. 417; Kranz, p. 225; Ziegler, p. 213; Jan, p. 297; Ryffel, p. 192.

175. \$ 15 multiplied by 1,200 (= \$ 18,000) [transport costs are even not taken into account].

176. \$ 15 multiplied by 4,800 (= \$ 72,000).

177. \$15 multiplied by 6,000 (= \$90,000); cf. supra V A 2.

178. Schlechtriem-Eberstein/Bacher, Art. 78, No. 15; Herber/Czerwenka, Art. 78, No. 2; Karollus, p. 227; Honsell-Magnus, Art. 78, No. 5; Enderlein/Maskow/Strohbach, Art. 78, No. 4.2; Schlechtriem, UN-Kaufrecht, No. 319.

179. Schlechtriem-Eberstein/Bacher, Art. 78, No. 15, Honsell-Magnus, Art. 78, No. 8,9; Herber/Czerwenka, Art. 78, No. 3.

180. Supra V A 2.