Award of Arbitration

The Grain and Feed Trade Association
Gafta House, 6 Chapel Court, Chapel Place
Rivington Street, London EC2A 3DQ
United Kingdom

OFFICIAL FORM - NO 12173

We, the undersigned, having been appointed to Arbitrate in a dispute that has arisen between CLAIMANT ROMAK S.A., Geneva
(SELLERS)

RESPONDENT FTC "UZDON", Tashkent
(BUYERS)

concerning Buyers' failure to pay for a quantity of 40,581.580 tonnes Kazak 3rd class milling wheat alleged to be delivered against the Contract, **DO HEREBY FIND and AWARD as follows:-**

1. THE FACTS:-

From the evidence before us, we find the following as facts;

1:1 On or about 10th July 1996 "**The Seller** Romak S.A., Geneva" and **"The Buyer** FTC 'UZDON', Tashkent" entered into a contract for the supply of up to 50,000 tonnes Kazak origin milling wheat 3rd class at a price of US$235.00 per tonne carriage and insurance paid to Kazak-Uzbek border station Chengeldy. The contract, which included the following terms, was not subject to the issuance of quotas:

"4. SHIPMENT/DELIVERY

4.1 Delivery period is till December 31st 1996

4.2 Earlier completion of shipments is allowed

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6. PAYMENT:

6.1 The Buyer is opening latest on October 10th 1996 a Letter of Guarantee in accordance with addendum No. 1 to this contract or an equivalent Letter of Credit of National Bank for Foreign Economic Affairs of Uzbekistan acceptable to both NBFEA and the Seller's Bank."

"9. OTHER TERMS:

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9.3 The Railway Bill must show: GAZHK "UZBEKISTON TEMIR JELLARI" for final receiver GAK "UZKHLEBOPRODUCT".
Station of destination "Shumilova". Station code 725409. Code of final receiver 0004".

"10. RESPONSIBILITIES OF THE PARTIES

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10.2 In case of improper execution of obligations by either party under the present contract (delayed opening of payment instrument, late delivery of the goods) a penalty of 0.2% is due for each day of delay.
..."

"11. ARBITRATION

11.1 The parties will endeavour to settle any disputes in a friendly way but in case it should be impossible to reach a mutually acceptable solution of any such disputes the case will be submitted for arbitration to G.A.F.T.A. London, for final and binding arbitration as per Rules of GAFTA No. 125

11.2 The present Contract is issued in Russian and English version both having equal legal value. Each language version is issued in two originals.

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One for the Seller and one for the Buyer.

11.3 The present Contract is in force from the moment of it's signing by the both parties and is valid until complete execution of their obligations by both parties."

1:2 On 10th July 1996 Buyers addressed a Letter of Guarantee to Sellers, signed by themselves and countersigned by "UZKHLEBOPRODUCT", in the following terms:
"Whereas we have concluded with you a contract for the delivery by you to us of upto 50,000 metric tons of Kazac orogon (sic) *milling wheat at a total price of upto USD 12,950,000 including financing costs and banking expenses.*

And whereas you have agreed to start immediate deliveries against part of this contract.

Now therefore we the Foreign Trade Company "UZDON" 36 Lakhuty Street Tashkent under the order of our superior authority "UZKHLEBOPRODUKT" 36 Lakhuty Street Tashkent Republic of Uzbekistan hereby irrevocably undertake

To sign the Contract and Addenda No. 1 as well as the Quadripartite Agreement as negotiated and agreed upon in July 1996

To open a Letter of Guarantee of the National Bank for Foreign Economic Affairs of Uzbekistan in accordance with Addendum No. 1 to the above mentioned contract or equivalent or an equivalent NBFEA Letter of Credit acceptable to your banker(s) as soon as possible but latest on October 10th

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1996

Copies of the Contract as well as Addenda No.1 and the Quadripartite Agreement are attached to this Letter of Guarantee duly signed and sealed by ourselves.

The present Letter of Guarantee is issued in English and Russian versions both having equal value."

1:3 Addendum No 1 to the Contract provided that:
"As per item 6 the Buyer is responsible for the opening of a letter of guarantee by National Bank for Foreign Economic Affairs of Uzbekistan with the Seller's bank, Credit Suisse, Geneva, as follows:"

There then followed the text of the guarantee to be furnished, valid until 15th June 1997, which provided for payment on first demand any amount up to US$ 12,950,000 against a statement that the Sellers had supplied FTC "UZDON" with goods in conformity with the terms of the contract, and the amount claimed had become due and had remained unpaid. Such claim had to be accompanied by a copy of the commercial invoice/s, including all cost for payment at 180 days from date of invoice (which must not be earlier than the date of delivery); and by copy of advice/s of delivery/railing advice/s indicating wagon numbers and dates, railway weights, departure station/s and confirmed by the stamp of the departure station/s or its/their superior railway authority/ies.

1:4 The Quadripartite Agreement referred to in the Letter of Guarantee is entitled *"Agreement on Cooperation in Grain Deliveries"*. It is stated to be between

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GAK "UZDONMAKHSULOT" *("the Guarantor")*, FTC "UZDON" *("UZDON")*, Messrs. "ODIL" *("ODIL")* and Romak *("Romak")*, and it is signed by ODIL, UZDON, Romak and GAK UZKHLEBOPRODUCT.

It is headed *"Re: Deliveries by Romak of about 50,000 (fifty thousand) metric tons Kazak wheat to Uzdon under the Contract No.____ dated ____"*

We find as a fact that the unnumbered and undated contract referred to in that heading and elsewhere in the text is the one which is the subject of this dispute.

1:5 The Quadripartite Agreement contained the following provisions:

1. Deliveries by the Romak to UZDON under their Contract would be internally counted under contract 6-2/005 between ODIL and UZDON

2. Shipments to be performed 15,000 tonnes in July, 25,000 tonnes in August and the balance as per contract

3. And vice versa, future deliveries by ODIL to UZDON under contract 6-2/005 would be internally counted against the Romak/UZDON Contract.

4. ODIL would pay to UZDON the financing and banking costs of Romak under Romak/UZDON contract in the amount of US$24 per tonne by presenting free of charge Reestres to UZDON in the form and quantity acceptable to them.
   N.B The Tribunal understands "Reestres" to be Railing Advices

5. ODIL guaranteed to execute deliveries as per point 3 above from Kazak

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linear silos in first turn immediately upon completion of the 1996 harvest and in strict accordance with the quality terms and delivery period of the Romak/UZDON Contract.

6. *"It is understood that Romak bears no responsibility for ODIL's performance under the present agreement and in case ODIL for the reasons whatsoever fails to timely execute partially or fully the deliveries under the present agreement the quantities shipped by Romak under this agreement will be automatically counted as Romak's deliveries under Romak's Contract No. ___ dated ___ with UZDON.*
In this case, ODIL will bear full responsibility for the consequences of such non-performance under the present agreement and UZDON will be obliged to proceed against ODIL in arbitration".

7. UZKHLEBOPRODUCT guaranteed to buy no less than 50,000 tonnes of wheat from Romak upon allocation of quota by the Government of the Republic of Uzbekistan.

1:6 On 24th July 1996 Sellers signed the following statement addressed to UZDON, ODIL and UZKHLEBOPRODUKT:
"Supply of Kazakstan wheat to Uzbekistan
In the present letter we confirm that Kazakstan wheat in the volume of 5,520.450 metric tonnes already shipped by us according to the attached notices no. 1-4 as well as wheat shipped now by the firm Romak from Kazakstan to Uzbekistan is supplied to GAK UZKHLEBOPRODUKT on account of contract No. 6-2005 of 02.10.95 between the firm ODIL and GAK UZDONMAKSULOT"

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1:7 On 24th October 1996 (i.e. after the July and August deliveries had already been made), the General Manager of Buyers sent a message to Sellers as follows:

Concerning: our contract for 50,000 mt Kazak 3cl milling wheat
Further to your letter of October 11th 1996 and our recent discussions we wish to express our regrets for the fact that due to late allocation of funds the letter of credit for this business has so far not been opened. We are doing our best and expect to correct this situation in the near future as a result of which our letter of credit should reach you not later than November 10th 1996. Please excuse the inconvenience caused."

1:8 The Letter of Guarantee/Credit had still not been opened when on 15th February 1997 Buyers sent Sellers a letter as follows (Sellers' translation):- *"Due to uncertainties in respect of allocating by the Government of the Republic of Uzbekistan of quota to Romak S.A. for the purchase of milling grain in 1997 we kindly ask you to stop as of 31.01.1997 accrual of penalties provided by clause 10.2 of the Contract between Romak S.A. and FTC "UZDON" attached to GAK "UZKHLEBOPRODUCT", due to circumstances beyond UZDON's influence*

1:9 On 18th February 1997 UZDON wrote to Sellers as follows:
"Due to the fact that GAK "UZKHLEBOPRODUCT" is the guarantor of payment and the Trustee of the business for purchase of grain from company 'Romak S.A.' and that the total volume of 40,581.579 mt of the shipped grain has entered the books of GAK "UZKHLEBOPRODUCT" we ask you to readdress collections no. HT-684049A22, HT-683904A22, HT-683877A22 for the total amount of USD 13,022,929.22 to corporation GAK "UZKHLEBOPRODUCT".

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1:10 On 25th March 1997 Sellers sent a message to Buyers and to *UZKHLEBOPRODUCT*, with a copy to The Chief Consultant of the office of the President of Uzbekistan, in which they referred to Buyers' message of 24th October (see 1:7 above); subsequent verbal promises, direct or through *UZKHLEBOPRODUCT* for solutions to the difficulty in supplying the contractual payment instrument, which would be forthcoming; Buyers' request of 15th February 1997 (see 1:8 above) for cessation of the accrual of penalties for delay in opening the payment instrument; and a letter received from the Office of the President of the Republic of Uzbekistan repudiating the Contract, alleging that "it cannot be regarded as the operable one".

Sellers gave notice that although the Contract provided an open-ended clause for penalties for late supply of the payment instrument, they could not continue to invoice late payment penalties and gave Buyers until 27th March 1997 to provide payment for the goods shipped, or alternatively the payment instrument or "a mutually acceptable solution", failing which they would put Buyers in default and proceed to arbitration.

1:11 On 28th March 1997 ODIL wrote to Sellers referring to the deliveries of 40.5 thousand tonnes, which they said had been supplied in accordance with the quadripartite agreement on account of contract No. 6-2/005 between ODIL and UZKHLEBOPRODUCT. It had been guaranteed by UZKHLEBOPRODUCT that they would purchase grain from Sellers when quota was allocated by the Government, and that supplies would be made by ODIL on account of that quota. However, since quota had not been allocated by the Government to UZKHLEBOPRODUCT, settlement for the grain supplied under the ODIL contract would now be made by ODIL, who would make settlement during the course of 1997.

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1:12 Sellers put Buyers in default and claimed arbitration on 2nd April 1997.

1:13 On 10th April 1997 UZDON'S lawyer wrote to Sellers rejecting their claim on the grounds that performance of the contract had been rendered impossible by force majeure, in that the Government of Uzbekistan had not allocated a quota for the purchase of grain from Romak. The letter continued:

"2. Aforementioned circumstances do not deny delivery of milling wheat by "Romak S.A.", but as you acknowledge yourselves the delivery has been made in accordance with the instructions received from GAK "UZKHLEBOPRODUKT" and not from FTC "UZDON" and this evidences which is confirmed by fax from "Romak S.A." dated 24th July 1996 which informs that wheat delivery is executed to be counted under contract number 6-2/005 dated 2.10.95 between "ODIL" company and GAK "UZKHLEBOPRODUKT".

3. By its letter dated February 27th 1997 FTC "UZDON" have informed "Romak S.A." that FTC "UZDON" has no its own turn-over assets for wheat payment and acts under the orders of GAK "UZKHLEBOPRODUKT" which is the Guarantor, payor and receiver of 40,581.579 mt Kazak milling wheat shipped by "Romak S.A.". We ask you to readdress invoices and documentary presentation of Credit Suisse NT-68404A22, NT-683904A22, N-T683877A22 for total USD 13,022,922.22 to GAK "UZKHLEBOPRODUKT" for payment to beneficiary.

1:14 As Buyers did not make timely appointment of an arbitrator, Sellers applied to The Grain & Feed Trade Association ("GAFTA") for an appointment to be made on Buyers' behalf, and Mr J.D. Allen was duly appointed on 21st April 1997.

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1:15 Following receipt of Buyers' submissions by GAFTA, Mr F.M. Aldridge was appointed by the Association as third arbitrator and Chairman on 6th May 1997, thereby constituting the Tribunal in accordance with the Rules of the Association.

2. SELLERS' SUBMISSIONS:-

2:1 Sellers had made deliveries of Kazak milling wheat totalling 40,581.580 tonnes during the period June to November, which they claimed to be deliveries under this Contract. They had not been paid in any way, and accordingly claimed payment in the amount of US$10,510,629.12.

2:2 They also claimed:

a) contractual penalties of $4,454,800 for delay from 10th October until 31st March 1997 in opening the letter of credit/guarantee, being 172 days at 0.2% of $12,950,000

b) late payment interest to 31st March 1997 on invoices maturing during the months of February and March 1997, calculated at 1.2% per month: $131,012.76.

Together with interest and the costs of this arbitration.

3. BUYERS' SUBMISSIONS:-

3:1 In October 1995 a contract was concluded between ODIL and GAK UZKHLEBOPRODUKT for the delivery of Kazak milling wheat. Supply obligations were not fulfilled under this contract, and on the recommendation of ODIL Romak participated in deliveries of wheat under it during July/August 1996.

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3:2 UZKHLEBOPRODUKT only guaranteed to buy 50,000 tonnes of milling wheat from Romak upon the allocation of a quota to Romak by the Government, together with the opening of a corresponding letter of credit, in accordance with article 7 of a quadripartite agreement, duly signed by Romak

3:3 Romak voluntarily participated in the deliveries of wheat under a contract between ODIL and UZKHLEBOPRODUKT. This is supported by Romak's documents dated 24th July 1996 (see 1:6 above) and subsequently. Moreover, on the basis of Romak's documents, the customs shipment declarations for the wheat being supplied were drawn up by the Uzbekistan Customs Committee as being deliveries by ODIL.

3:4 No supply of grain was made under an unnumbered and undated contract between UZDON and Romak relating to future quotas, which is confirmed by the absence of appropriate remarks in the railway shipment bills for the grain supplied.

The contract for future quotas between Romak and UZDON was signed on the territory of Uzbekistan, and its coming into force and fulfilment is regulated in the first instance by the legislation of Uzbekistan. This means that before coming into force it is essential for a number of obligatory procedures to be complied with - the fulfilment of which became impossible due to force majeure, namely the fact that a quota was not allocated by the Government of Uzbekistan to Romak for a certain quantity of wheat. Hence the signed contract does not have force under the laws of the Republic.

3:5 Since Romak did not present the shipment documents to UZDON, the latter were limited to the shipment registers *(lists)* prepared by Romak. UZDON did

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not know that deliveries were not being made under the contract between them/Romak but would be done directly under contract 6-2/005 between ODIL and UZKHLEBOPRODUKT. That is why in their letter of 27th February 1997 UZDON told Romak of their refusal to pay for the grain supplied to UZKHLEBOPRODUKT under the contract with ODIL, and asked for the documentary presentation to be readdressed to UZKHLEBOPRODUKT as recipient of the grain and guarantor of the deal. UZDON was only able to check the shipping documents on 28th February 1997 and to make sure that there was no reference to supply being made under the Romak/UZDON contract.

3:6 In a letter dated 24th July and others, Romak confirmed that shipment of the grain was performed under the contract between UZKHLEBOPRODUKT and ODIL.

Buyers also produced an undated letter to UZKHLEBOPRODUKT from Rukin & Schwarzgorn stating that wheat in the volume of 4,989.950 tonnes had been bought and shipped on UZKHLEBOPRODUKT's behalf by ODIL under contract no 6-2/005 on 2.10.95

3:7 Since Romak knew beforehand that delivery of the grain would be made on behalf of UZKHLEBOPRODUKT and voluntarily participated in deliveries of grain under contract No. 6-2005 between ODIL and UZKHLEBOPRODUKT, UZDON considers that the only possible way to settle the dispute is a hearing with ODIL regarding with which company the deliveries were made or whether they were made with the guarantor of the deal.

3:8 For the above reasons UZDON rejected Romak's claims, considering them to

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be unfounded as deliveries were made on behalf of UZKHLEBOPRODUKT under their contract with ODIL without the participation of UZDON.

4. FURTHER SUBMISSIONS OF THE PARTIES:-

4:1 Sellers submitted that Buyers' defence could be summarised as follows:-

a) The contract was subject to quota, and as this was not obtained, it never came into existence and/or its performance was excused for "force majeure".

b) UZKHLEBOPRODUKT (the Uzbek State Enterprise whose trading department is UZDON) undertook to buy from Romak if they obtained a quota (this undertaking being provided in the quadripartite agreement, a copy of which was produced to the Tribunal - see 1:5 above).

c) Romak, acting as agent for a third party named ODIL, delivered the goods against ODIL's previously defaulted contract with UZKHLEBOPRODUKT and in consequence is owed nothing.

4:2 As the contract in arbitration contains no provision making its existence conditional upon the performance of internal formalities by Buyers, such as registration and/or delivery of a quota or licence, Buyers' first argument should fail.

4:3 The contract was concluded on 10th July - the very day that UZDON had entered into an agreement with UZKHLEBOPRODUKT whereby UZDON was to purchase grain from Romak. A copy of this agreement was produced to the Tribunal, which showed inter alia that the purchase was to be of 50,000 tonnes Kazak origin milling wheat minimum 3rd class, delivery 15,000 tonnes

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July, 25,000 tonnes August and the balance as per the terms of the contract with Romak, delivery to be to "BAK "UZBEKISTAN-TEMIR YOLLARI" in accordance with the shipping order of UZKHLEBOPRODUKT, payment to be made by ODIL or by UZKHLEBOPRODUKT. Receipt of the goods by UZDON was acknowledged by them in their letter of 10th April 1997 (see 1:13 above).

As the present arbitration is not with UZKHLEBOPRODUKT, their undertaking to buy from Romak if they obtained a quota (see 4:1-b) is irrelevant. Such business was ultimately not done.

4:4 Concerning Buyers' third argument, Sellers submitted copy of a loan agreement which showed that on 2nd October 1995 the National Bank for Foreign Economic Activity of the Republic of Uzbekistan ("NBFEC") entered into a loan agreement, with ODIL as debtor and UZDONMAKHSULOT as sub-debtor, in respect of deliveries of milling wheat. Under this agreement the NBFEC was to make available a revolving credit of US$8.1 million for advance payments to ODIL's supplier, their associated company ADEL (Kazek). The agreement provided that as ODIL performed its obligations regarding deliveries of wheat their indebtedness for loans made would be transferred to UZDONMAKHSULOT.

Advance payments were made to ADEL but deliveries of the prepaid wheat were not made under their contract with ODIL. The prepayments were said to have been invested into new (1996) crop wheat production. UZKHLEBOPRODUKT decided to cover the immediate shortage resulting from ODIL's failure to ship them old crop wheat through a purchase of wheat for prompt delivery but with deferred payment. Hence their purchase through

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UZDON from Romak basis payment October 10th 1996.

4:5 UZDON/UZKHLEBOPRODUKT wished to arrange their internal records so as not to disclose to their superior Uzbek authorities and/or the National Bank that although ODIL had been prepaid for deliveries they had not delivered; which if it had been known would have brought about the obligation of UZKHLEBOPRODUKT to reimburse the bank.

According to the scheme of UZKHLEBOPRODUKT, ODIL was to deliver to them during October/December 1996 a quantity of new crop Kazak wheat large enough to cover the value of the wheat delivered by Romak, plus interest and banking expenses.

Under the quadripartite agreement, Romak's deliveries had to be administratively or internally cleared in Uzbekistan under the then available quota/licence of UZKHLEBOPRODUKT's contract no 6-2/005. That is why the quadripartite agreement laid down the technicalities and procedures to be followed by UZDON and/or UZKHLEBOPRODUKT in the administration of this intended swap of goods to be delivered to UZDON/UZKHLEBOPRODUKT by their two suppliers Romak and ODIL.

4:6 Sellers signed the statement of 24th July (see 1:6 above) at the urgent insistence of UZDON/ UZKHLEBOPRODUKT who assured them that these papers were needed solely for their internal purposes, as outlined in the quadripartite agreement; and they were thus given within the framework of that agreement. It is to be noted that these papers are partly undated and only in the Russian language, i.e. without a signed English version, which highlights the fact that they were strictly for internal Uzbek purposes. It is

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totally out of context and bad faith for Buyers to contend that these letters represent a transfer of ownership to ODIL or ADEL of the wheat delivered by Sellers to UZDON/ UZKHLEBOPRODUKT, or that Sellers otherwise delivered on behalf of ODIL/ADEL. This was also clearly not the understanding and intention of UZDON at the time, as is evidenced by their letters of:

- October 24th 1996 by which they promised payment for November 10th 1996

- February 15th 1997 asking Sellers to stop as of January 31st 1997 the counting of penalties provided by clause 10.2

- February 18th 1997 asking Sellers to re-address the documentary presentation to UZKHLEBOPRODUKT, the consignee of Sellers' deliveries and the guarantor of this business

The above letters are clear evidence that at least until February 18th 1997 Buyers acknowledged not only the legal validity of the Contract, but also their obligation to pay for Sellers' deliveries which they accepted, as well as the penalties as per clause 10.2 of the Contract. It was in fact not until March 20th 1997 (the date of the letter from the Presidential Council) that the Uzbek party refused to pay the price for the first time.

4:7 The quadripartite agreement also specified the procedures to be followed in the case of non-delivery by ODIL, and explicitly excluded the responsibility of Romak for ODIL's performance thereunder by its Article 6 which provided: *"It is understood that Romak bears no responsibility for ODIL's performance under the present agreement and in case ODIL for the reasons whatsoever fails to timely execute partially or fully the deliveries under the present*

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agreement the quantities shipped by Romak under this agreement will be automatically counted as Romak's deliveries under Romak's Contract No. ___ dated ___ with UZDON.
In this case, ODIL will bear full responsibility for the consequences of such non-performance under the present agreement and UZDON will be obliged to proceed against ODIL in arbitration". (Sellers' emphasis)

Despite this clause UZDON has not proceeded with arbitration against ODIL for unknown reasons.

4:8 Under the quadripartite agreement, if ODIL performed, the books of UZDON and UZKHLEBOPRODUKT would be squared; but if they did not, then the goods delivered by Romak under the contract in arbitration would have been recorded by UZDON under the Romak Contract.

Buyers/Receivers "internally counted" Sellers' supplies under their contract with ODIL, and customs cleared them as if they had actually been delivered by ODIL. But they should subsequently have adjusted their records to reflect the fact that ODIL defaulted on their obligation to deliver new crop wheat.

4:9 Sellers never authorised or intended to assist UZDON or UZKHLEBOPRODUKT to obtain Customs declarations with false indications (consignor, consignee or contract no 38/11, a contract not mentioned in the quadripartite agreement and of which Sellers have no knowledge). The false declarations are in contradiction with the contract, the quadripartite agreement, Seller's letters and the shipping documents.

4:10 Sellers submit that as sellers Cost Paid To (CPT) Kazak-Uzbek border station

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Chengeldy they do not have any responsibility regarding Buyers' and/or consignees' organisation of their internal affairs in Uzbekistan. The fact that Sellers saw no inconvenience in the internal swap under the quadripartite agreement does not alter Buyers' obligation to pay for goods delivered and received, a duty which was not altered by the terms of that agreement.

4:11 The letter dated 24th July signed by Sellers was for the sole purpose of assisting Buyers and their consignees to take delivery of the grains and effect their internal formalities

Sellers also produced a letter dated 25th March 1997 from Rukin and Schwarzgorn, which they said was a correction of the letter produced by Buyers (see 3:6 above). This corrected their previous letter concerning 4,989.950 mt of wheat, which they now stated to constitute part of a bigger volume delivered by Romak. This volume had initially been imported under contract 4/3 dated 14.6.96 with SERVICETORG, Tashkent. At the request of UZKHLEBOPRODUKT and with the agreement of Romak, this volume had been passed under the business between Romak and UZDON; and customs clearance of the goods had been changed to contract No. 6-2/005 dated 2.10.95

Sellers emphasised that they had concluded only one contract with UZDON, namely the one in arbitration.

4:12 ODIL's letter dated 28th March 1997 (see 1:9 above) was never been received by Sellers before the arbitration; it is irrelevant as Sellers' contract was with UZDON and not with ODIL. Sellers strongly rejected the argument that Romak had entered into a contract with ODIL, and effected deliveries as

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their agent, so that the obligation to pay for them was that of ODIL.

4:13 Concerning Buyers' point as to the notices of shipment, Sellers stated that they had provided notices of shipment both upon first availability of information (although there was no obligation to do so under the contract), and together with formal advices of shipment, to which invoices and official shipping lists were attached as soon as available from origin. The invoices clearly identified the shipments as having been made under the Contract in arbitration.

4:14 As to the law applicable to the Contract, which does not cater for its governing law, Sellers submit that under Article 4 of the EEC Convention on the Law Applicable to Contractual Obligations, where the parties have not made an express or implied choice of law the contract is governed by the law of the country with which it is most closely connected. If there is an English arbitration clause this carries a great weight.

In *Egon Oldendorff v. Liberia Corporation [1995] LLR 64* the Court said:
"This particular clause provided for arbitration in a third party country, with a well-known and well-established system of marine arbitration, before arbitrators conversant with shipping matters. I find unconvincing the suggestion that what was contemplated was that the arbitration tribunal should apply a foreign law, whichever party's to resolve disputes entrusted to them in these circumstances."

Sellers submitted that the proper law of a contract providing for GAFTA arbitration in London is English Law and that therefore this dispute should be adjudicated in accordance with it.

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Buyers responded that:

4:15 The State is not responsible for the obligations and debts of the State Shareholding Corporation UZKHLEBOPRODUKT, and vice versa. The Government of Uzbekistan had not guaranteed payment and had no obligations towards Romak for the delivery of 40,000 tonnes of grain.

4:16 The contract between UZDON and Romak had been prepared in the expectation of future quotas. Bearing in mind that Romak's contention that the letter they signed to the effect that supply of wheat was on account of the ODIL contract was only for internal Uzbed purposes, Buyers submitted that this contract concerning future quotas should be regarded as formal only.

4:17 Neither Uzdon nor Romak were parties to the Loan Agreement. Documents concerning the grain delivered by Romak have been presented by ODIL to the bank against the prepayment.

4:18 Buyers also reiterated their arguments that the contract had not come into existence because of non-obtaining of quota; and that deliveries made by Romak under the ODIL/UZKHLEBOPRODUKT contract had been made on behalf of ODIL. There were no documents to prove the factual performance of obligations under the Romak/Uzdon contract. As Romak had not carried out any shipments under this Contract, they had no financial expenditures under it and their claim was groundless.

4:19 UZDON could not arbitrate against ODIL because they were not parties to contract 6-2/005 and therefore had no legal relations with ODIL; moreover the deliveries made were deliveries of ODIL, for which payment had been made.

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5. **FINDINGS**:-

5:1 It has been submitted by Buyers that the Contract between the parties never came into being because, due to force majeure, certain obligatory processes were not undertaken; and hence under the law of Uzbekistan the signed contract has no force.

5:2 The Contract contains a clause that if the parties are unable to reach a mutually acceptable solution, disputes are to be submitted for arbitration to GAFTA London for final and binding arbitration as per the Rules of GAFTA No. 125.

5:3 The said Rules provide at 1:2 that arbitrations shall take place in London (or elsewhere if mutually agreed, which is not applicable in this case); and at 1:3 that the provisions of the (English) Arbitration Acts 1950, 1975 and 1979 shall apply to every arbitration.

5:4 **WE FIND THAT** in the absence of a specific choice of law, the parties have, by choosing that arbitration should take place in England under the Rules of an English Association, GAFTA, which is widely used internationally for the settlement of disputes in the grain trade, chosen by implication that this arbitration is to be decided in accordance with English law.

5:5 **WE FIND THAT** under English law the Contract as signed was valid without any further processes. Further more we note that Buyers' message of 24th October (see 1:7 above) treats the Contract as being operative. Sellers claim to have given performance under it, and we have now to consider whether the admitted deliveries made to border station Chengeldy were made under this Contract or otherwise.

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5:6 It appears from the submissions of the parties concerning the background to this transaction that ODIL had made a contract of sale no. 6-2/005 to UZKHLEBOPRODUKT for Kazak milling wheat, which had been purchased by them from their associated Kazak company ADEL; that a prepayment had been made to ADEL for which ODIL was responsible; that there was a default in deliveries; that UZKHLEBOPRODUKT had authorised UZDON to purchase 50,000 tonnes of milling wheat from Romak; that Romak had made deliveries of some 40.5 thousand tonnes of wheat, which were counted against ODIL's contract 6-2/005; and that if any deliveries were subsequently made by ODIL from the 1996 harvest, none were counted against this present Contract.

5:7 However, we are concerned in this arbitration only with the contract between the parties for the sale and purchase of up to 50,000 tonnes of milling wheat. Any other contracts and agreements referred to in the submissions made to us are only of relevance in so far as they evidence amendments or variations to the Contract under dispute.

5:8 Addendum 1 to the Contract provided that Sellers should invoice Buyers for payment 180 days from date/s of invoice/s, which must not be dated earlier than the date/s of delivery. Invoice/s to be accompanied by copies of advices of the deliveries. The total price for 50,000 tonnes, including financing costs and banking expenses, was now $12,950,000, i.e. $259.00 per tonne - an increase of $24.00 per tonne in respect of financing and banking costs.

If not otherwise paid by Buyers, Sellers were to be able to claim payment under a first demand payment guarantee to be issued by Credit Suisse against a counter guarantee from NBFEC. Under the Contract, this payment guarantee was to be opened latest 10th October.

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5:9 **WE FIND THAT** on 10th July the shipment period in the Contract was amended to 15,000 tonnes July, 25,000 tonnes August and the balance by 31st December, and that Sellers agreed to commence immediate deliveries (even though Buyers were not obliged under the Contract to open a Letter of Guarantee before 10th October) in consideration of Buyers' undertaking to sign the Contract and addendum no. 1, as well as the quadripartite agreement, and to open the letter of guarantee as soon as possible but latest October 10th 1996

5:10 Sellers invoiced Buyers for a total of 40,581.580 tonnes delivered, of which 40,301.580 tonnes were invoiced on various dates between 8th August and 9th September, and a quantity of 280 tonnes invoiced by an invoice dated 21st January 1997. They have not been paid for these deliveries by Buyers, since documentary collections were refused, and the promised payment guarantee/letter of credit was never opened.

5:11 There is no dispute that the quantities claimed by Sellers have been delivered and counted against ODIL's contract No. 6-2/005 with Buyers. However, Buyers contended that these deliveries were not made under, and in accordance with the Contract as amended, but were made voluntarily by Sellers on behalf of ODIL, as indicated by the fact that the customs declarations indicated the deliveries by ODIL, not Sellers.

We do not accept that, having a contract with Buyers which provided for deliveries under it to be internally counted against contract No. 6-2/005, Sellers then voluntarily made deliveries outside that Contract as agents for ODIL. No evidence has been produced to show that any such arrangements had been made with ODIL, indicating at the very least the way in which

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payment was to be made.

WE FIND THAT these deliveries were made in accordance with the Contract, as varied in accordance with the quadripartite agreement, wherein Buyers and Sellers agreed that Sellers' shipments were to be counted internally (i.e in Buyers' records) against Buyers' contract no. 6-2/005 with ODIL; and Buyers would then count internally the delayed shipments of ODIL against Buyers' contract with Sellers.

5:12 However, the Contract variation evidenced by the quadripartite agreement also states that if ODIL failed to perform for whatsoever reason, Romak's deliveries would be counted against their contract with Buyers. **WE FIND THAT** ODIL did not perform by making any deliveries to be counted internally against Sellers' Contract, and that therefore in accordance with Contract, as amended, the quantities shipped by Romak were automatically to be counted as Romak's deliveries under this Contract. **WE FURTHER FIND THAT** it was not necessary under the Contract for the documentation of physical railings to be corrected, only that the goods should be treated by Buyers as having been delivered against the Contract.

5:13 In view of the above findings, **WE FIND THAT** the deliveries totalling 40,581.580 tonnes were made under this Contract, and Buyers were obliged to make payments on the various due dates as claimed by Sellers.

5:14 Sellers have also claimed penalties under clause 10:2 of the Contract, relating to improper execution of obligations by either party, for late opening of the letter of guarantee/credit.

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WE FIND THAT where the terms of a contract provide that, in the event of a breach, one party shall pay the other a specified sum of money, the sum may be either a penalty (which is irrecoverable) or liquidated damages (which are recoverable). If the amount fixed was not a genuine pre-estimate of damages, but an amount fixed as a deterrent to ensure that the promise was not broken, it is to be regarded as a penalty, and the promisee should receive by way of damages only that sum which will compensate him for his actual loss.

We have therefore to consider whether the sum claimed constitutes liquidated damages, in which case it may be allowed in full, or a penalty, in which case we may award only the sum which will compensate Sellers for their actual loss.

5:15 The fact that the Contract states the claimed amount to be a penalty is not conclusive; we are concerned not with what it is called but what it is. However, the fact that he sum laid down is a daily amount, and applies to widely different obligations, suggests that it is not a genuine pre-estimate of damages.

The Contract as amended provided for shipment of at least 40,000 tonnes to be made before the Guarantee was required to be opened, and the due date for payment was 180 days after date of invoice, which must not be earlier than date of delivery. Late opening of the Letter of Credit/Guarantee did not affect due dates for payment.

Aside from the loss of interest resulting from payment after due date, which is a separate head of claim, we can find no damages resulting from Buyers' failure to open the Letter of Credit/Guarantee in due time, which further

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indicates to us that the sum claimed is not a pre-estimate of damages but a penalty. In all the circumstances **WE FIND THAT** Sellers have not established a claim for damages under clause 10.2 of the Contract.

5:16 Sellers have claimed interest to 31st March 1997 on the payments due during February and March 1997, and have further claimed interest on our award.

The interest to 31st March is calculated at 1.2% per month "in accordance with our contractual agreement", resulting in a claim of $131,012.76. We are unable to find any such provision in the Contract. **WE FIND THAT** we are empowered to award interest on any sums that we award, but consider the appropriate rate of interest to be 6½% p.a.. **WE FIND THAT** if interest had been calculated to 31st March 1997 on these various late payments at a rate of 6½% p.a. the sum due would have been $60,288.57

WE DO HEREBY AWARD THAT Buyers shall forthwith pay to Sellers the sum of US$ 10,510,629.12 (ten million five hundred and ten thousand six hundred and twenty nine United States Dollars and twelve cents) in respect of 40,581.580 tonnes of milling wheat delivered under the Contract.

WE FURTHER AWARD THAT Buyers shall forthwith pay to Sellers interest as follows:

- US$ 60,288.57 (sixty thousand two hundred and eighty eight United States Dollars and fifty seven cents) being interest at 6½% (six and one-half per cent) per annum on US$ 10,438,109.22 (the value of 40,301.580 tonnes invoiced between 8th August and 9th September 1996) from the respective due dates until 31st March 1997

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AWARD OF ARBITRATION 12173

- Interest at the rate of 6½% (six and one-half per cent) per annum on US$ 10,438,109.22 (the value of 40,301.580 tonnes invoiced between 8th August and 9th September 1996) from 1st April 1997 to the date of this Award

- Interest at the rate of 6½% (six and one-half per cent) per annum on US$ 72,520.00 (the value of 280 tonnes invoiced on 20th January 1997) from the due date of 19th July 1997 to the date of this Award.

WE FURTHER AWARD THAT Sellers' claim for penalties **FAILS**

ARBITRATORS:-

R J Short

J D Allen

F M Aldridge

G.A.F.T.A.
22 AUG 1997

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AWARD OF ARBITRATION 12173

And the Fees and Expenses of this Arbitration as under:-

	£
Association Fees	1590.00
Discount for Members	450.00
Expenses Translation Fees £280 + £20 courier	300.00
Arbitrator's Fees	2450.00
VAT	0.00
	£3890.00 (DATED)

are to be paid by Buyers. In addition, the sum of £85.00, being the fee for the Appointment of an Arbitrator, is to be paid by Buyers.

In the event of an Appeal being lodged against this Award, Appeal fee for Members and Non-Members shall be: £1,750.00

GAFTA's VAT Identification No: GB 243 8967 24
Seller's VAT Identification No: not applicable
Buyer's VAT Identification No: not applicable