ICDR CASE NO 00 00 T 0000 00

IN THE MATTER OF AN ARBITRATION UNDER THE

ICDR INTERNATIONAL ARBITRATION RULES

B E T W E E N:

[LA SCÈNE A.G.K.]

Claimant Sellers

-and-

[GOLD & SIVER INTERNATIONAL, INC]

Respondent Buyers

PARTIAL AWARD

1. The dispute in this arbitration relates to the sale in January 2004 of Le Réunion Vanilla Beans in which the Claimant Sellers are claiming damages against the Respondent Buyers of in excess of US $23 Million.

2. This arbitration, therefore, comes before the Tribunal under a contract (numbered Contract 23232) dated 14th January 2004 ("the Contract") and ostensibly entered into by [La Scène AG] ("[La Scène]") of St. Denis in the Island of Le Rèunion, Indian Ocean and [Gold & Silver International Inc] ("[Gold & Silver Madagascar]") of Morondava in Madagascar, Indian Ocean.

3. The Contract contained the following Arbitration Clause ("the Arbitration Clause"):

"In the event of disputes Arbitration Rules of the American

Arbitration Association in New York will apply"

The Tribunal was appointed, pursuant to this Arbitration Clause, by the international division of the American Arbitration Association ("AAA"), the International Centre for Dispute Resolution ("ICDR") and, by the agreement of the Parties, this Arbitration is being conducted under the ICDR International Arbitration Rules ("the ICDR Rules") as effective from 1st July 2003 and as administered by the ICDR.

4. This Partial Award is firstly directed towards the procedural issue whether three additional parties now being named by the Claimant can be treated as Respondents in this arbitration thereby entitling the Tribunal to exercise its powers under Article 15 of the ICDR Rules to rule whether one or more of these parties are the true or proper parties to the Arbitration Clause. These additional parties are [Gold & Silver Company. Inc.] (["Gold & Silver USA"]) of Boston in Massachusetts, USA, [H.A.Spencer Company, Inc. (["H.A.Spencer Company"]) of Cleveland, Ohio, USA and [Mr Harry Spencer Jnr.] (["Mr Harry Spencer Jnr]") citizen of the USA.

5. In reference to the above parties, it is not plain to the Tribunal whether [H.A.Spencer Company, Inc] is a separate entity to [H.A.Spencer Group, Inc] which is also named in the papers before it but it suffices to record that the Claimant has named [H.A.Spencer Company, Inc] (not [H.A.Spencer Group, Inc]) as an additional party in this arbitration.

6. In Order 11 (ii) of the Tribunal's Orders for Directions No.1 dated 22nd December 2005, the Tribunal invited the first of these additional parties (being

the only one the Claimant was then naming) to make submissions to the Tribunal through Counsel for the Respondent.

7. This invitation was not taken up and, in the circumstances, although both Parties had made Submissions on the 'proper parties' issue, the Tribunal in its Orders for Directions No. 4 dated 9th March 2006 directed the Claimant

> *"… to notify the Tribunal, within the next 14 days, whether Claimant has taken steps to serve notice pursuant to Article 2 of the ICDR International Arbitration Rules on any persons and/or entities it may wish to join as respondents in this arbitration together with any other steps which may be required by international arbitration practice to effect such joinder".*

8. As part of this exercise the Respondent was given leave to file Submissions in reply and the Claimant to file rejoinder Submissions.

9. To that end, on 23rd March 2006, the Claimant placed before the Tribunal three 'Amended' Demands for Arbitration in which the three purported additional Respondents were named "[Gold & Silver Company Inc]" (namely [Gold & Silver USA]) "[H.A.Spencer]" (namely, it seems, H.A.Spencer Company) and "[Harry Spencer Jnr.]" In doing so Counsel for the Claimant used printed forms obtained from the AAA and hand wrote the word "Amended" in front of the printed "Demand for Arbitration" heading on each form. In preparing and issuing these 'Amended' Demands for Arbitration,

Counsel for the Claimant also described, as it related to each new purported Respondent, the 'Nature of the Dispute' against that Respondent.

10. There has now also been placed before the Tribunal the Respondent's Submissions, together with the supporting annexures, on this issue dated 6th April 2006 and the Claimant's Submissions in reply dated 21st April 2006.

11. The Tribunal should record that it has also received Submissions from both Parties on the Governing Law on, as already identified, the 'proper parties' issue itself and on the Oral Hearing and the Production of Documents and Information but none of these other Submissions bear upon the present issue before the Tribunal.

12. At the outset the Tribunal should make it plain, relating to the issue before it, there are two quite separate matters. The first is whether the correct procedures have been followed to give the Tribunal power to decide who are the party or parties in this arbitration and the second goes to the definitive matter itself – namely who should be held to be the proper party or parties to the Contract.

13. Before the Tribunal turns to the facts before it, it should be recorded that the Respondent denies that the correct procedures had been followed to give the Tribunal jurisdiction over the additional purported Respondents.

14. The facts relating to the alleged introduction into this arbitration of the purported additional Respondents are set out below.

15. In its Statement of Case of 9th February 2005 the Claimant only named, on the title page, [Gold & Silver Madagascar] as Respondent in the following terms:

> ***"GOLD AND SILVER INTERNATIONAL, INC***
>
> Corporate & Secretarial Services Centre, Ltd.
>
> 4th Floor Anglo Madagascar House
>
> 10 Independence Street
>
> MORONDA
>
> MADAGASCAR"

16. It was then not until its Statement of Response, dated 16th May 2005, to the Respondent's Response and Counterclaim that the Claimant named on the title page [Gold & Silver USA] as a Respondent in the following terms:

> ***"GOLD AND SILVER INTERNATIONAL COMPANY, INC***
>
> 200 Freedom Drive
>
> BOSTON, MA 02110
>
> Massachusetts
>
> U.S.A."

In doing so, the Claimant asserted in the text of its Statement of Response that, in effect, [Gold & Silver USA] was the true contracting party to the Contract.

17. It was not until submitting its Submissions on Proper Parties, dated 20th February 2006, that the Claimant named on the title page ["H.A.Spencer Company"] and ["Mr. Harry Spencer Jnr"] as Respondents without any identification as to their addresses or to any place where they could be served

with papers in this arbitration. In the text of these Submissions, the Claimant asserted that [H.A.Spencer Company] should be brought into this arbitration as a Respondent on the grounds that it was the "Successor in Title" of [Gold & Silver USA] and that [Mr. Harry Spencer Jnr.] should be brought into this arbitration as a Respondent on the grounds that of "personal liability" for his 'fraudulent' conduct "in manipulating contracts via companies which he controls and which 'vanish' to suit his ….strategies…"

18. However, although the Claimant only named [Gold & Silver Madagascar] on the title page of its Statement of Case, the Claimant repeatedly in the text of its Statement of Case appears to name [Gold & Silver USA] as the other party in this arbitration. For example, in paragraph 22 of its Statement of Case, the Claimant asserts under a heading "**The company Gold"**

> *"The company GOLD & SILVER International & Corporation is a subsidiary company at 100% of group H.A.Spencer (H.A.Spencer Inc) registered in Boston, USA. Created in 1930 by William Silver, it is directed today by Harry Spencer Jnr and is specialized among other things in the importation of vanilla".*

While the Claimant did not, in this paragraph, give the correct corporate name to [Gold & Silver USA], it seems that the Respondent could only have been identifying, in this paragraph, "[Gold and Silver Company, Inc. of Boston, Massachusetts]". Moreover from the descriptions of the activities of (as named throughout its Statement of Claim) "[Gold & Silver]", in paragraphs

23-28, 94, 120, 155 and 166 it seems that the Claimant could only have been referring to [Gold & Silver USA] and not to [Gold & Silver Madagascar]. Thus the descriptions of [Gold & Silver] being "a determining actor on the world market of vanilla [and] the principal importer of the United States, who absorbs two thirds of the world production [of vanilla]" (para 23), being "one of the largest supplier of the American food industry" (para 24), being regarded "as the absolute reference [in] natural vanilla and [exerting] considerable influence on the market" (para 25) being a "market leader [in the vanilla industry]" (para 155) and being "the barometer of the market tendency [and] unapologetically the trend setter in the vanilla industry" (para 166) could not, it seems, have been referring to the offshore company in Madagascar but only to the parent company in the USA. The reference to creating a subsidiary company in the United Kingdom (para 120), again it seems, could only be referring to [Gold & Silver USA].

19. The Tribunal also notes the same pattern of identity of [Gold & Silver USA] in the Claimant's Statement of Response of 16th May 2005.

20. Another indication concerning which [Gold & Silver] company is being identified in the Statement of Case, comes from examining the letters and emails to which the text of the Statement of Case refers. With the exception of two letters written under the letterhead of [Gold & Silver Madagascar] (see Claimant's Exhibits 21 and 24) and even the former of these was, on its face, written from the USA by an officer of [Gold & Silver USA], all of the letters and emails exhibited to the Claimant's Statement of Case, in reference to the [Gold & Silver] company being named in it, are letters and emails sent by

[Gold & Silver USA]. Regarding the letters, reference can be made to exhibits 6, 7, 11, 14 and 16 and, regarding the emails, to exhibits 8, 9 and 19. Therefore, for example, when referring to Exhibits 6 and 7 in paragraph 167 of the Statement of Claim, the Claimant appears to be linking the "[GOLD & SILVER]" named in this paragraph to the actions taken by [Gold & Silver USA] in making the payments of $2,000,00 and $1,000,000 to the Claimant's Bank in Paris (Bank Paribas).

21. Another point can be noted. In paragraph 201 of its Statement of Case, the Claimant refers to the "GOLD AND SILVER company [being the buyer] ***via*** GOLD AND SILVER INTERNATIONAL INC**"** [EMPHASIS ADDED]. This point is then taken up again by the Claimant in its Statement of Response when it is asserted that [Gold & Silver Madagascar] was acting as a "***frontage*** [in the] *contractual relation…carried out"* by [Gold & Silver USA] [EMPHASIS ADDED] (second paragraph on page 17). While the Claimant is not using the right terminology, it can only have been alleging, in these two passages, that [Gold & Silver Madagascar] was, in some contractual capacity, acting as the agent of [Gold & Silver USA] in entering into and carrying out the Contract.

22. This crossover in the identity of the true respondent does not only rest in the Claimant's pleadings. The Respondent in its Response and Counterclaim of 14th April 2005 also appears to be referring, almost throughout this pleading, to [Gold & Silver USA] as being as the "Respondent". In particular reference can be made to paragraphs 10, 11, 12, 14 and 15 of the Response and Counterclaim. The vanilla beans were shipped under the Air Waybills of 14th

and 29th January 2004 (see Claimants Exhibits 15 and 17) by Air Madagascar from the Claimant in Le Réunion directly to [Gold & Silver USA] Boston in Massachusettes. Hence in the Response and Counterclaim where there is a reference to the vanilla beans being "shipped to Respondent" it must be referring to the vanilla beans being shipped not to [Gold & Silver Madagascar] but to [Gold & Silver USA] (see para 10 of the Response and Counterclaim). Similarly it was [Gold & Silver USA] who informed [La Scène] of the need "to air the vanilla beans" (see para 10 a) and similarly it was [Gold & Silver USA's] customer who "rejected the vanilla"(see para 11). Furthermore all the further references to the "Respondent" in paragraphs 11 -15 in the Response and Counterclaim appear to be, without exception, referring to [Gold & Silver USA] and not [Gold & Silver Madagascar].

23. Attention should also be paid to the letter of 10th March 2005 which was sent to the ICDR by Counsel for the Claimant. This letter and attachments reveal that Counsel for the Claimant appears to have served the Statement of Claim on both [Gold & Silver Madagascar] and [Gold & Silver USA] – the latter receiving delivery of the Statement of Claim at 10.36 hrs on 9th February 2005. This information is obtained from the courier's letter of 25th February 2005 as attached to Counsel for the Claimant's letter of 10th March. Furthermore there is also attached to this letter of 10th March, a copy of the completed courier dispatch form of 7th February 2005 in which the "Destinataire" is named as follows:

"Harry Spencer Jr

Gold and Silver International

200 Freedom Drive

Boston, MA 02110

USA"

with the "Personne á contacter" named as ["Mr. Harry Spencer Jr"] coupled with the Boston telephone number of [Gold & Silver USA].

24. It is also to be noted that Counsel for the Claimant, in describing in the letter of 10th March, the service of the Statement of Claim writes:

> "This demand [ie the Statement of Claim] has been remitted to the respondent at his main offices both in Madagascar and in the United States"

25. Thus it appears that the Statement of Claim was served on [Gold & Silver USA] albeit that the Claimant persisted in not using the correct name for [Gold & Silver USA].

26. The primary decision for the Tribunal is whether, in compliance with the ICDR Rules, particularly with Article 2 of the ICDR Rules, the Claimant is entitled to introduce new parties into this arbitration which were not properly named. The requirements contained in Article 2 of the ICDR Rules are quite specific. Under Article 2.1, there is a requirement upon the claimant to give written notice of arbitration to the ICDR administrator and the party (or parties) against whom a claim is being made. Furthermore, in Article 2.3 (b), the statement of claim should include "the names, addresses and telephone numbers of the parties". Thereafter the ICDR administrator has a duty, under

Article 2.4, to "communicate with all parties with respect to the arbitration". Unless, therefore, the ICDR administrator has each party, whom a claimant is naming, clearly identified on the face of the statement of claim, it cannot carry out its duty to "communicate with all parties with respect to the arbitration".

27. There are also other considerations. As rightfully argued by Counsel for the Respondent, in the nature of the arbitration process, a claimant can only seek to make other parties as respondents in the arbitration at the outset of the arbitration process. There is no power, for example, to amend a statement of claim under Article 4 of the ICDR Rules in order to bring in another party at a later stage in the arbitration. As correctly submitted by Counsel for the Respondent, the power to amend under Article 4 is restricted to "amending or supplementing a claim, counterclaim or defense" and does not include a power to bring in new parties. More than that, as again correctly argued by Counsel for the Respondent, every party in an arbitration is entitled to participate in the appointment of the arbitrators and in the choosing of the place and language of the arbitration. If an arbitration has already been set up by the time attempts are made to introduce further parties to it, these rights will be denied to 'new arrivals' as parties. It seems, therefore, to the Tribunal that it is not possible, under the ICDR Rules, to introduce any new parties into an arbitration after the commencement of it. This must, therefore, place a bar on the Claimant introducing new parties into this arbitration notwithstanding (as it has claimed) it may not have had the information before it, at the outset of the arbitration, to introduce the party which it later wishes to introduce. For all the reasons, also correctly put forward by Counsel for the Respondent, the attempt to bring in new parties by manually amending the Demand for Arbitration forms of the

AAA simply does not work in this case nor, in the view of the Tribunal, could it work in any other case under the ICDR Rules.

28. In the light of the facts outlined in paragraphs 18 to 25 above, the next question for the Tribunal is to decide whether the Claimant did sufficiently name [Gold & Silver USA] in its Statement of Claim to enable the Tribunal to exercise its powers under Article 16 of the ICDR Rules and hold that [Gold & Silver USA] should be treated to be a Respondent in this arbitration which, in turn, will enable the Tribunal to exercise its powers under Article 15 of the ICDR Rules to decide whether [Gold & Silver USA] is the proper party to the Contract – thus giving the Tribunal jurisdiction over it.

29. It is plain this exercise cannot be carried out in relation to either [H.A.Spencer Company] or [Mr. Harry Spencer Jnr.] whom the Claimant did not remotely identify in its Statement of Claim as parties in this arbitration and, on no basis, can either of them be found to be a party in these proceedings.

30. While it is clear that new parties cannot (in the absence of the agreement of the Respondent which is not forthcoming) be introduced into this arbitration after the commencement of it, the question is whether [Gold & Silver USA] did, in fact, become a party in this arbitration at the commencement of it.

31. The Tribunal could approach this decision on the basis that it is the core nature of an arbitration, a private dispute settlement mechanism founded upon the agreement of the parties, that all the parties in it have been afforded an opportunity to participate in the constitution of the tribunal. Not to abide by

this principle would infringe Article V paragraphs 1 (b) and 1 (d) of the New York Convention and expose this Award to a legal challenge under Section 10 of the US Federal Arbitration Act. In this case, albeit that [Gold & Silver USA] may have been named in the text of the Statement of Claim and may have been served with Statement of Claim, the Claimant was never properly identified in the Statement of Claim (for example by its full and correct name and address appearing on the title page of the Statement of Claim) so that the ICDR, as the administrator of this arbitration, was able to perform its duties under Article 1.4 of the ICDR Rules and to have brought [Gold & Silver USA] into the process under which this Tribunal was constituted.

32. The other approach which the Tribunal could take is a practical one. Notwithstanding the failure of the Claimant properly to name [Gold & Silver USA] in the Statement of Claim and in the documents used in the service of it, it clearly appears that in the text of Statement of Claim Counsel for the Claimant was referring to [Gold & Silver USA] and not to [Gold & Silver Madagascar]. It is also clear that the Statement of Claim was served upon [Gold & Silver USA]. In arbitrations parties sometimes do not correctly name other parties. Provided it is clear (as in this case) to whom the party is referring, the misnaming of another party is not fatal to that party's arbitral case. Moreover in its Response and Counterclaim, the Respondent clearly appears to have acknowledged that [Gold & Silver USA] was, in fact, a Respondent in this arbitration. On this premise, therefore, it can hardly deny [Gold & Silver USA] has not been a party in this arbitration from the outset.

33. Nor can it be said, on the facts before the Tribunal that [Gold & Silver USA] was deprived of participating in the choice of the arbitral tribunal, the place of arbitration, the Governing Law and the language of the arbitration. As the parent company of [Gold & Silver Madagascar] it cannot, through [Mr. Harry Spencer Jnr.] have been uninvolved in the decisions on the matters. Moreover this Tribunal was appointed not on the choice of [La Scène] and [Gold & Silver USA] but on the decision of the ICDR. Further there can hardly be any argument by [Gold & Silver USA] against the choice of New York as the place of arbitration and English as the language of the arbitration. Finally the Tribunal has not yet decided the Governing Law for this dispute. Having received the Submissions of the parties on the Governing Law, the Tribunal has indicated that it appears that the Law of the State of New York is likely to be the Governing Law but this is subject to the argument presented by Counsel for the Respondent, namely if [Gold & Silver USA] was to become a party in this arbitration then the Law of the State of Massachusetts may be more appropriate as the Governing Law. In any event, for the purpose of making this decision on whether [Gold & Silver USA] should be treated as a Respondent in this arbitration it is clear that either the Law of New York or Massachusetts – and no other law – applies.

34. On balance the Tribunal prefers to adopt the practical approach. It seems quite clear to the Tribunal that, through [Mr Harry Spencer Jnr.], [Gold & Silver USA] was actively involved in this arbitration from the very beginning of it and cannot be said to be deprived of participating in the setting up of it.

35. The next question, therefore, is whether [Gold & Silver Madagascar] or [Gold & Silver USA] was the true party to the Contract. The Tribunal has no difficulty in deciding that it was. It is plain that [Gold & Silver Madagascar] was, at all times, before and after the Contract was formed, acting as the agent of [Gold & Silver USA]. The principal officers of [Gold & Silver Madagascar], most particularly [Mr Harry Spencer Jnr.], were the principal officers of [Gold & Silver USA]. There is no record of any of them working or operating in Madagascar – the registered office in Morondova, Madagascar seems to be no more than a postbox. Save for the Contract and two other letters being typed on the notepaper of [Gold & Silver Madagascar], all the communications (particularly the emails) were between [La Scène] in Le Réunion and [Gold & Silver USA] in Boston. Both parties treated [Gold & Silver USA] as the ultimate contracting party for the purchase of the vanilla beans until the Respondent appreciated, during the course of this arbitration, it could avoid liability by asserting that it was [Gold & Silver Madagascar] not [Gold & Silver USA] who was the true contracting party to the Contract.

36. Accordingly the Tribunal holds that [Gold & Silver Madagascar] was effectively the Respondent in this arbitration from the outset of it and holds that [Gold & Silver Madagascar] was acting as the agent of [Gold & Silver USA] at the time of the entering into the contract on 14th January 2004. It, therefore, follows that the Tribunal has jurisdiction to decide this dispute between [La Scène] and [Gold & Silver USA].

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

(1) **THAT WE HAVE JURISDICTION TO DECIDE THE SUBSTANTIVE ISSUES IN THIS ARBITRATION BETWEEN [LA SCÈNE A.G.K OF ST.DENIS, LE RÈUNION] AND [GOLD & SILVER COMPANY, INC. OF BOSTON IN MASSACHUSETTS, USA];**

(2) **THAT ALL ORDERS RELATING TO COSTS AND EXPENSES ARISING OUT OF THIS PARTIAL AWARD ARE RESERVED TO OUR FINAL AWARD**

DAVID HACKING

CHAIRMAN

MAY 2006

[THIS PARTIAL AWARD WAS NOT ISSUED TO PARTIES]