

IN THE MATTER OF THE ARBITRATION ACT 1996

**AND IN THE MATTER OF AN ARBITRATION UNDER THE LCIA ARBITRATION
RULES**

BETWEEN:-

[GRASS CORP] Claimant
(A company incorporated in the Republic of Panama)

- and -

[MONTREUX TRADING SA] Respondent
(A company incorporated in Switzerland)

AWARD

1. ARBITRATION

- 1.1 These disputes come before us, Mr [James Upright] QC, Mr [Daniel Honest] QC and Lord Hacking [Chairman] (“**the Tribunal**”) following two Requests for Arbitration made by the Claimant on 14 August 2013 in relation to two contracts, namely Contract CC00124S dated 7 June 2011 and Contract CC00131S dated 21 June 2011 (“**the Contracts**”). The Respondent responded to the Requests for Arbitration on 27 September 2013. The LCIA Court proceeded to constitute the Tribunal in each of the Arbitrations on 8 November 2013. The completion of that process was notified to the Parties on 11 November 2013. The two Arbitrations were then consolidated on 19

December 2013 by way of the Tribunal's Procedural Order Number 1, following the agreement of the Parties (hereinafter "**these Arbitrations**").

2. THE PARTIES

- 2.1 In these Arbitrations the Claimant, [Grass Corp], is a company incorporated in the Republic of Panama and is the seller ("**Claimant**", "**Claimant Seller**" or "**Grass**") and the Respondent, [Montreux Trading SA], is a company incorporated in Switzerland and is the buyer ("**Respondent**", "**Respondent Buyer**" or "**Montreux**"). Throughout these Arbitrations the Claimant Seller has been represented by [The ABC International Law Group] of Kyiv, Ukraine and [Blue and Partners LLP], London Solicitors, and the Respondent Buyer by [Andre International] of Geneva, Switzerland.
- 2.2 During the course of these Arbitrations the following additional parties (not being parties to these Arbitrations) were also referred to and became relevant. These were: (i) [Lenin Iron and Steel Works], the Russian supplier of the HRC to the Claimant Seller ("**LISW**") (ii) [Kobylin Iranian Co] ("**Kobylin**") purchaser of 12'230.86 mt of HRC from the Claimant Seller; (iii) [Grass Corp (Middle East) Ltd] ("**Grass ME**") a company beneficially owned by [Mr Beata Timmermanns] and transferee of the HRC that was not delivered to the Respondent Buyer or Kobylin; and (iv) [Hotmetal General Trading LLC] ("**Hotmetal**") purchaser of the remaining HRC from Grass ME in February 2013.
- 2.3 At the Oral Hearing (see paragraph 6.1 below) the Claimant Seller was represented by [Mr John Smith] of Counsel and the Respondent Buyer by [Dr Pierre Blanche] and [Mr Michel Raedler] of Andre International. The Tribunal is most grateful for the assistance provided throughout these Arbitrations by the ABC law firm, Blue and Partners, and Andre International. The Tribunal is

also particularly grateful for the assistance of Mr Smith, Dr Blanche and Mr Raedler at the Oral Hearing.

3. THE DISPUTE

3.1 The dispute between the parties concerned the contracts entered into between them on 7 June 2011 (“**Contract 124**”) and 21 June 2011 (“**Contract 131**”) relating respectively to the sale and purchase of 10,000 metric tonnes (+/-10%) and 15,000 metric tonnes (+/-10%) of hot rolled coils (“**HRC**”).¹ Grass contended that Montreux had repudiated the Contracts by its email of 27 March 2012 refusing to accept further shipments under the Contracts, thereby causing Grass loss and damage. It was Montreux’s pleaded case that it was entitled to and did terminate the Contracts on 23 January 2012 because Grass had failed to deliver the HRC in accordance with the Contracts (although notably this contention was not supported by Mr Fleur’s email of 23 January 2012). Montreux also argued that, even if it did repudiate the Contracts, Grass had not proved that it had suffered any recoverable loss.

4. ARBITRATION AGREEMENT, SEAT OF ARBITRATION AND GOVERNING LAW

4.1 In each of the Contracts the parties agreed that:

“This Contract and all matters arising from or connected with it are governed by, and shall be construed in accordance with English law.

Any dispute or difference of whatever nature howsoever arising between the Parties under, out of or in connection with this Contract (including a dispute or difference as to the

¹ In this Award “metric tonnes” is abbreviated as “mt” and “per metric ton” as “pmt”.

breach, existence, termination or validity of this Contract) (each a Dispute) shall (regardless of the nature of the Dispute) be referred to and finally settled by arbitration in accordance with the LCIA Rules (the Rules) as at present in force (which Rules are deemed to be incorporated by reference into this clause by a panel of three arbitrators appointed in accordance with the Rules.

The seat of arbitration shall be London, England. The procedural law of any reference to arbitration shall be English law. The language of the arbitration shall be English. The appointing authority for the purposes set forth in the Rules shall be the LCIA Court. Any award given by the arbitrator shall be final and binding on the parties to the Dispute and shall be in lieu of any other remedy.

Subject to Clause 1.3 below the parties expressly waive their rights of recourse to the courts of England and Wales or any other court of competent jurisdiction, including their rights under sections 45 and 69 of the Arbitration Act 1996, to determine any points of law arising in the course of, or out of an award made in, any proceedings conducted under this Contract which shall be valid for the service of any Request or other document pursuant to the Rules.”

- 4.2 Accordingly the juridical seat of these Arbitrations is England, and the governing and procedural law of them English law including the UK Arbitration Act 1996.
- 4.3 By Procedural Order No.3 dated 27 May 2014 the parties agreed not to exclude judicial review under sections 46 and 69 of the Arbitration Act 1996 and thereby varied the arbitration agreements in the Contracts (see paragraphs 4.1 above and 5.1.2 below).

5. PROCEDURAL HISTORY

5.1 These Arbitrations have been subject to seven Procedural Orders in total. Of these the most important were:

- 5.1.1 Procedural Order No 1, dated 19 December 2013, consolidating these Arbitrations and confirming the seat and governing law of the same, amongst other orders;
- 5.1.2 Procedural Order No 3, dated 27 May 2014, recording the agreement of the parties to vary the Contracts so as not to exclude judicial review under sections 45 and 69 of the Arbitration Act 1996, stating that the Tribunal would adopt the 2010 IBA Rules of Evidence, giving Directions, setting a Timetable for the progression of these Arbitrations and setting the matter down for an Oral Hearing having heard submissions by the Parties on such matters; and
- 5.1.3 Procedural Order No 5, dated 17 September 2014, allowing the Respondent Buyer's application to the Tribunal, dated 29 July 2014, for permission to call [Mrs Mary Porte] and [Mr Jean Fleur] as witnesses on its behalf, notwithstanding that it had not filed or served any written witness statements from them and ordering "witness summaries" of the evidence that Mrs Porte and Mr Fleur were expected to give. In the event, Mrs Porte and Mr Fleur refused to attend as witnesses and the Respondent Buyer made no further applications in this respect, instead choosing to conduct the Oral Hearing without them. Accordingly, in view of their non-attendance, the "witness summaries" of their expected evidence were put to one side and the Tribunal took no account

of them in dealing with these Arbitrations.

6. CONDUCT OF THESE ARBITRATIONS

- 6.1 These Arbitrations were conducted by way of an Oral Hearing under Article 19 of the LCIA Rules. The Oral Hearing was conducted over four days on 27, 28, 29 and 30 October 2014 at the IDRC at 70 Fleet Street London EC4Y 1EU.

7. WITNESS STATEMENTS AND TESTIMONY OF WITNESSES

- 7.1 The Claimant Seller put before the Tribunal three witness statements of [Mr Beata Timmermanns] (“Mr Timmermanns”) dated 14 July 2014, 11 August 2014 and 10 October 2014. At the material time Mr Timmermanns was the sole beneficial owner and shareholder of the Claimant Seller. The Claimant Seller also put before the Tribunal two witness statements of [Mr Gustav Pin] (“Mr Pin”) dated 11 August 2014 and 24 October 2014, holding the position of Purchasing and Sales Director of the Claimant Seller. Finally, the Claimant Seller put before the Tribunal a witness statement of [Mr Eugene Tostol] (“Mr Tostol”), holding the position of Director of Operations and Sales Manager of the Claimant Seller. All of these witnesses appeared before the Tribunal at the Oral Hearing.
- 7.2 Further the Claimant Seller put before the Tribunal an expert report of [Ms Zara Chekov] (“Ms Chekov”) dated 14 July 2014 and Ms Chekov also attended to give oral testimony on the third day of the Oral Hearing. Ms Chekov is an international market observer at Metal Expert (Ukraine). The Tribunal was most grateful to Ms Chekov for the assistance which she gave.
- 7.3 The Respondent Buyer put before the Tribunal two witness statements of [Mr Mohammed Azeez] (“Mr Azeez”) dated 11 July 2014 and 10 August 2014. Mr Azeez’s official position was disputed, with the Claimant Seller alleging that he

had a greater stake in Montreux than he was admitting and that he was essentially the ‘controlling mind’ of Montreux at the relevant time and the Respondent Buyer saying that he was simply a consultant for Montreux. Mr Azeez appeared before the Tribunal at the Oral Hearing.

- 7.4 As a matter of record the second and third witness statements of the Claimant Seller’s witness, Mr Timmermanns, and the first and second witness statements of Mr Pin were replying to and contesting the evidence provided in the first witness statement of the Respondent Buyer’s witness Mr Azeez. Similarly, the second witness statement of Mr Azeez was in reply to and contesting the first witness statements of Mr Timmermanns and Mr Tostol.
- 7.5 By way of expert testimony the Respondent Buyer put before the Tribunal the expert report of [Mr Andrew Greenhouse] (“Mr Greenhouse”), dated 8 August 2014 and Mr Greenhouse also attended to give oral testimony on the third day of the Oral Hearing. Mr Greenhouse is currently the Head of Trade and Commodity Finance Origination at Scipion African Opportunities Fund SPC where he specialises in commodity logistics. As with Ms Chekov, the Tribunal was most grateful to Mr Greenhouse for the assistance he gave to us.

8. THE CONTRACTUAL POSITION

- 8.1 By Contract 124, dated 7 June 2011, the Claimant Seller agreed to sell, and the Respondent Buyer agreed to buy, 10,000 mt (+/- 10%) of Non-Skin Passed HRC at USD 747.50pmt and by Contract 131, dated 21 June 2011, the Claimant Seller agreed to sell, and the Respondent Buyer agreed to buy, 15,000 mt (+/- 10%) of Non-Skin Passed HRC at USD 747.00pmt.
- 8.2 The Contracts contained similar wording and provided for the same delivery period, namely “*latest by 20 September, 2011*”, referred to in the Contracts as the “*Shipment date*”. Partial shipments (i.e. delivery by instalments) were

allowed but, under the terms of the Contracts, they were all still due to be delivered by 20 September 2011. Moreover, in both Contracts, all the goods were to be in a state of “readiness” at the loading port (Astrakhan Port in Russia being used by the Seller) by 30 August 2011.

- 8.3 Delivery was to be effected on a Cost and Freight Free-Out basis according to INCOTERMS 2000 to the port of destination, Bandar Anzali in Iran. The Contracts also contained a clause which stated that *“Risk shall pass from Seller to Buyer after material crosses ship’s rails, but title shall pass only after receipt of payment in full for all materials shipped under this Contract.”*
- 8.4 The payment terms were also identical, namely *“90% of the total amount shall be effected at sight copy of Bill of Lading and Commercial Invoice, and balance payment (10%) shall be effected at sight copies of Certificate of Origin, Inspection Certificate, General Packing List.”*
- 8.5 The Claimant Seller contended that there had been a variation of the Contracts as to the terms of payment and obligations to deliver following discussions that took place at a meeting on 3 August 2011 in Montreux’s office in Geneva, which Mr Timmermanns of Grass and Mr Jean Fleur and Mrs Mary Porte of Montreux attended. Grass asserted that, at that meeting, Montreux orally agreed to vary the Contracts so that Montreux would make advance payments of 95% against the Forwarders’ Certificate of Receipt (“FCR”) before each shipment and the balance of 5% would be paid against Bills of Lading (referred to as “*pre-financing*”). Grass said that it relied upon this agreement and arranged the relevant shipments pursuant to the same.
- 8.6 Grass also contended that by necessary implication the shipment deadline of 20 September 2011 was also varied on the basis that Grass was no longer obliged to make any shipment unless and until payment was made by Montreux under the payment terms as varied and, therefore, the delivery period was also extended. Furthermore, in support of its assertion in this

respect, Grass relied on Montreux's conduct in accepting and paying for seven shipments made after 20 September 2011 without objection.

- 8.7 The Respondent Buyer denied that there was any such variation and contended that it had simply offered Grass the possibility of pre-financing some of the goods at Montreux's sole discretion, on a case-by-case basis and subject to Montreux's own availability of funds. Montreux asserted that this proposal, which was discussed between the Parties, was never intended to alter the Parties' contractual obligations.
- 8.8 The Claimant Seller also asserted that on or around 20 October 2011 the parties reverted to payment against Bills of Lading, with 95% of the price of the relevant shipment to be paid at sight (or at the latest within 5 days) of copy Bill of Lading and Commercial Invoice with the balance of 5% being payable at sight against Certificate of Origin, Packing List and Inspection Certificate. These appear to be the final contractual payment terms that the Parties were working to and it was not suggested by either party that there were any further variations after 20 October 2011. Notably, there was no new date given or it seems discussed in relation to the deadline for delivery.
- 8.9 At the oral hearing, both parties were agreed that the Contracts came to an end on or shortly after 27 March 2012 when Montreux sent its email refusing to accept further shipments under the Contracts (Montreux having given up its pleaded argument that it terminated the Contracts on 23 January 2012). The outstanding issue was whether Grass was in repudiatory breach of contract as at that date or whether Montreux repudiated the Contracts by terminating them on that date.
- 8.10 In the event, it was not necessary for the Tribunal to consider the respective arguments in relation to variations of contract and/or repudiation any further because on the morning of the final day of the Oral Hearing, Dr Blanche on behalf of the Respondent Buyer, whilst saying that the situation was not

clear-cut and that both parties were not delivering and paying in accordance with their respective contractual obligations, conceded that the evidence does not clearly show that Grass was in repudiatory breach of contract in March 2012, but rather showed that Montreux, the Respondent, repudiated the Contracts at that date. When asked if that meant the Respondent was conceding liability, Dr Blanche confirmed that was the case. Given the Respondent's concessions, it was agreed by the Parties that the contractual position as at the date of termination was irrelevant, that the Respondent had repudiated the Contracts and the Claimant had accepted that repudiation on 27 March 2012. Accordingly, the only remaining issues relate to the quantum of the Claimant's claim.

8.11 For these purposes the sequence of events following the repudiation of the Contracts by the Respondent Buyer was as follows:

8.11.1 By way of contract CC120428S, dated 28 April 2012, Grass agreed to sell (among other goods) 12,230.86 mt of non-skinned passed HRC to Kobylin (as identified in paragraph 2.2 above) at USD 748.00pmt, the total price being USD 9,148,683.28. This quantity was the entirety of the HRC rejected by Montreux on 27 March 2012 – 4,949.44mt being stored at the load port of Astrakhan in Russia and 7,281.42mt being stored at the discharge port of Anzali in Iran. Kobylin is an Iranian company which had been introduced as a substitute buyer of the HRC by Mr Azeez.

8.11.2 Kobylin took delivery of the 7,281.42mt of HRC which had been discharged and stored at Anzali ("**the Anzali HRC**"). However, Kobylin only paid Grass USD 3,990,471.98 (representing the price of 5,334.85 mt of HRC). Consequently, the price of USD 1,456,003.18 for the balance of 1,946.5 mt of HRC remained unpaid.

8.11.3 Mr Timmermanns of Grass asserted that the payment of USD 3,990,471.98 by Kobylin was made in the following tranches:

- 8.11.3.1 on 12 September 2012, Kobylin paid USD 2,446,106.16;
- 8.11.3.2 on 20 October 2012, Kobylin paid USD 1,000,000.00;
- 8.11.3.3 on 19 January 2013, Kobylin paid USD 272,182.91; and
- 8.11.3.4 on 30 April 2013, Kobylin paid USD 272,182.91.

It is, however, to be noted that there was only supporting evidence before the Tribunal of the first two of these payments.

8.11.4 The balance of 4,949.44 mt of HRC remained at the port of Astrakhan (“**the remaining HRC**”). It was at the port for almost 18 months and was stored outside for at least part of that 18 month period. Grass claimed that it incurred storage charges during this period (this claim is addressed further below).

8.11.5 On 21 February 2013, Grass ME (as identified in paragraph 2.2 above as a company beneficially owned by Mr Timmermanns) entered into contract CCME-HRC with Hotmetal (as also identified in paragraph 2.2 above), whereby Grass ME agreed to sell and Hotmetal agreed to buy the remaining 4,949.44mt of HRC at USD 570.00pmt (amounting to USD 2,821,180.80 in total). As far as the Tribunal is aware, Grass ME duly received this amount from Hotmetal. It was Mr Timmermanns’s evidence that Grass had earlier transferred the relevant HRC to Grass ME by contract.

9. THE ISSUES

- 9.1 On the third day of the Oral Hearing the Tribunal presented a skeletal list of issues to the Parties and they agreed that the list accurately represented the issues that the Tribunal had to determine. As recorded above, on the morning of the final day of the Oral Hearing the Respondent conceded all issues relating to liability.
- 9.2 The issues relating to quantum, as formulated by the Tribunal, were as follows:
 - (1) Notwithstanding the fact that there was an available market for the HRC in March 2012, should the *prima facie* measure of damages in s.50(3) of the Sale of Goods Act 1979 be displaced?
 - (2) If so, (i) on what grounds and (ii) are the losses on the substitute sales costs of reasonable mitigation?
 - (3) Is any part of the loss claimed too remote?
 - (4) Are the storage costs recoverable, and if so, for what period?

10. CLAIMANT SELLER'S SUBMISSIONS ON QUANTUM

- 10.1 The Claimant Seller had six key submissions:

- 10.1.1 The re-sale to Kobylin was so intimately connected to the initial relationship between Grass and Montreux (given Mr Azeez's involvement in both relationships) that the s.50(3) Sale of Goods

Act 1979 measure of damages should be displaced and the actual losses incurred by Grass should be awarded, totalling USD 2,327,774.36 (being 1,449,248.46 in respect of the HRC delivered to Kobylin but not paid for and USD 878,525.60 representing the difference between the original contract price and the price of the goods as re-sold to Hotmetal).

10.1.2 The sale to Kobylin and the later sale to Hotmetal were reasonable steps for Grass to take in mitigating its loss and Montreux has not discharged the burden on it to establish a failure to mitigate.

10.1.3 The sale price of the remaining HRC to Hotmetal of USD 570pmt was reasonable given that it had been stored for almost 18 months outside and would have degraded during that time.

10.1.4 Grass also incurred storage charges levied by LISW (as identified in paragraph 2.2 above) for the time that the remaining HRC was at the Astrakhan port and it seeks to recover the storage charges incurred from 28 March 2012 onwards. Grass has put forward several different calculations for this claim for storage charges.

10.1.5 As an alternative to the actual losses incurred, Grass seeks an award of damages based upon s.50(3) of the Sale of Goods Act 1979, namely the difference between the contract price and the market price at the time of the refusal by Montreux to accept delivery of the HRC under the Contracts (i.e. 27 March 2012). Grass' pleaded claim was for USD 520,576 under Contract 124 and USD 546,483.54 under Contract 131 based on a market price of USD 660pmt. At the hearing it was common ground

between the experts that the FOB market price of the HRC in March 2012 was USD 651 pmt and the applicable freight was between USD 27pmt and USD 28.50pmt, giving a range for the market price of the HRC CFR Bandar Anzali of USD 678pmt to USD 679.50pmt, namely a difference of USD 1.50pmt.

10.1.6 Grass also claims interest, simple or compound, at 10%. The pleaded basis for this claim was that “*Grass was forced to borrow monies equivalent to [the claimed losses] at commercial borrowing rates of interest, namely 10% per annum on a compound basis*”.

11. RESPONDENT BUYER’S SUBMISSIONS ON QUANTUM

11.1 The Respondent Buyer primarily contended that, had Kobylin complied with its obligations under its contract with Grass of 28 April 2012, the Claimant Seller would not have suffered a loss and would instead have received a profit. It made the following main submissions:

11.1.1 None of the alleged losses are connected or could be imputed to the Respondent’s breach of contract. All of the losses claimed resulted from an alleged breach of contract between the Claimant and a third party, Kobylin.

11.1.2 At the time the Parties made the Contracts, the Respondent could not have reasonably foreseen the losses claimed as the possible result of breach of the same. Therefore, all of the losses sought by the Claimant are too remote from the Respondent’s breach and must be dismissed.

11.1.3 Alternatively, as there was an available market for the HRC in March 2012, the Claimant is claiming the wrong measure of

damages and, if anything, the s.50(3) Sale of Goods Act 1979 measure of damages should apply. However, the Respondent asserts that, in making this alternative claim, the Claimant had failed to identify, characterise or correctly describe the type of loss it was claiming from the Respondent and, therefore, its alternative claim should be dismissed on the basis that it suffered serious legal flaws.

11.1.4 The storage costs incurred were entirely a result of the Claimant's multiple extension of time requests under its contract with Kobylin and/or Kobylin's alleged breach of contract, which led to the sub-sale of the remaining HRC to Hotmetal on 21 February 2013. Further and/or alternatively, the Claimant's claim for storage costs is unsubstantiated.

11.1.5 The Claimant had not substantiated its claim for interest.

12. FURTHER SUBMISSIONS

- 12.1 At the Oral Hearing the Tribunal received lengthy submissions from Mr Smith on behalf of the Claimant Seller and from Dr Blanche on behalf of the Respondent Buyer both in opening and closing.
- 12.2 It will not assist, helpful though they were, to summarise all of the detailed submissions put forward by Mr Smith and Dr Blanche, which principally developed the main submissions summarised above. The better course, in the view of the Tribunal, is to focus on the submissions of Mr Smith and Dr Blanche as they relate to the specific issues which the Tribunal believes it should address in its Award. This in no way reflects against the considerable help which Mr Smith and Dr Blanche provided to the Tribunal.

13. DETERMINATIVE FINDINGS

The Termination Date

- 13.1 As recorded in paragraph 8.10 above Dr Blanche, on behalf of the Respondent, admitted liability on the fourth day of the Oral Hearing. This was based upon the email sent on 27 March 2014 by Mrs Porte of Montreux to Grass copying in Mr Azeez. In this email Mrs Porte stated:

“With reference to further shipments (as already informed you on 12th January 2012) we are forced by circumstances to reject any further shipments.”

Further, as recorded at paragraph 8.9, the parties were agreed that the Contracts came to an end on or shortly after 27 March 2012.

Section 50 of the Sale of Goods Act 1979

- 13.2 Section 50 of the Sale of Goods Act 1979 (“**the SGA**”) provides as follows:

“50.— Damages for non-acceptance.

(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time

or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

- 13.3 It is implicit in the Respondent's admission of liability that there had, by 27 March 2012, been an understanding between the parties, contractually binding on them, that the shipment period ending on 20 September 2011 had been extended leaving it open to the Claimant, for the foreseeable future, to continue to perform the Contracts.
- 13.4 As has already been noted, it was common ground between the experts that there was an available market for the HRC at the date of the termination of the Contracts.
- 13.5 The case was argued before us on the basis that the difference between the contract price and the market price of HRC sold on CFR Bandar Anzali terms (reflecting the *prima facie* measure of damages in section 50(3) of the SGA) was a potential measure of the Claimant's loss, not least because the Claimant could have mitigated its loss by selling the HRC which had not been accepted by the Respondent in the available market. However, as we have already indicated, there was strong disagreement between the parties as to whether this was in fact the appropriate measure of loss in all the circumstances of the case.

The Substitute Sales

- 13.6 The relevant facts are as follows. Mr Azeez (acting on behalf of Montreux) was heavily involved in the conclusion and performance of the Contracts. He negotiated the Contracts as the authorised agent of Montreux. He, or one of his colleagues, also negotiated Montreux's sub-sales of the HRC. Mr Azeez was also contracted by Montreux to collect the funds from Montreux's sub-buyers.

- 13.7 Mr Azeez also negotiated the contract between the Claimant and Kobylin. In doing so, he said in evidence that he was acting on behalf of Kobylin. However, the Kobylin contract covered all the HRC which had reached Port Anzali in Iran (7,281.42mt) (the Anzali HRC) and the unshipped HRC being stored at Port Astrakhan in Russia (4,949.440mt) (the remaining HRC). This contract was entered into on 28 April 2012 – a month after the Respondent had defaulted on the Contracts. The price was USD 748pmt, which was 50 cents higher than the price in Contract 124 and one dollar higher than the price in Contract 131. Significantly, however, the price in the Kobylin contract was significantly higher than the market price of about USD 680pmt at the end of March 2012. We find that the Kobylin contract was an (above market price) replacement for the Contracts and was presented by Mr Azeez to Grass as an alternative way of performing the Contracts.
- 13.8 Thereafter there were considerable delays in Kobylin performing the contract of 28 April 2012 - the last payment on which not being made until 30 April 2013, still leaving a shortfall on payment of the HRC in Anzali of USD 1,456.003.18 with no payment on the goods remaining at Port Astrakhan in Russia.
- 13.9 When it became plain that Kobylin was not going to fulfil its remaining contractual obligations under the contract of 28 April 2012, Grass ME (as the transferee of the remaining HRC from the Claimant) eventually, on 21 February 2013, sold to Hotmetal all of the remaining HRC, as still stored at Port Astrakhan – the HRC being sold at the lesser price of USD 570pmt in part because, as presented in evidence before the Tribunal, of a deterioration in the HRC which had been stored in the open and which had suffered rust and other damage.
- 13.10 Mr Smith referred us to *Pagnan v. Corbisa* [1970] 2 Lloyd's Rep. 14 (cited in Tettenborn, *Butterworths Law of Damages* para.22.11). That case is authority

for the proposition that, in cases where there is an available market in which the contract goods might be sold, but the innocent sellers enter into a substitute contract which is not at the market price, the sellers' losses will be based on that substitute contract (rather than the *prima facie* measure of the difference between the contract and market price) if the substitute contract (to quote from the judgment of the Court of Appeal in the *Pagnan* case) "*formed part of a continuous dealing with the situation in which [the sellers] found themselves and was not an independent or disconnected transaction*".

13.11 We have therefore considered whether the Kobylin and Hotmetal contracts formed a continuous line arising directly from the Respondent's breach of contract on 27 March 2012. We do not accept that Mr Azeez was standing back, in all his dealings with the transactions subject to these Arbitrations, as some form of a consultant. Dr Blanche, on behalf of the Respondent, had to concede in his final submissions at the Oral Hearing that Mr Azeez's evidence was unreliable. Dr Blanche went as far as to state that he, on behalf of the Respondent, had to "*disassociate [himself] to some extent from Mr Azeez's witness testimony*" and further went on to state that Mr Azeez was "*being dishonest*" in asserting in his statement evidence that he did not negotiate Contracts 124 and 131 on behalf of Montreux. Thus, Mr Azeez's participation in negotiating the terms of Contracts 124 and 131 and their performance, in negotiating Montreux's sub sales of the HRC to sub buyers in Iran, and in the roles he played in attempting to collect payments in Iran on behalf of Montreux and in setting up the Kobylin contract leaves a trail of continuity between Contracts 124 and 131 and the Kobylin contract.

13.12 In the view of the Tribunal the trail of continuity from the Kobylin contract went on into the Hotmetal contract and formed part of a continuous dealing with the situation in which the Claimant found itself. Thus both the Kobylin and Hotmetal contracts were not independent or disconnected transactions. The continuity from Contracts 124 and 131 to the Kobylin contract continued into

the Hotmetal contract because it directly arose out of the failure in the performance of the Kobylin contract which in turn had directly arisen out of the Respondent's breaches of Contracts 124 and 131.

13.13 Nevertheless, it is necessary to consider whether the Claimant was acting in reasonable mitigation of its losses under the Contracts in entering into the Kobylin and Hotmetal transactions. Turning to the law the Tribunal accepts the contentions, as cited by the Claimant and contained in the 19th Edition of McGregor on damages at paragraphs 9-004 and 9-005 that:

“...the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any loss which he could thus have avoided...”

“...where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss”.

13.14 The second proposition above, as again cited by the Claimant, was put by Lord Macmillan in the House of Lords, in the case of *Banco De Portugal v Waterlow & Sons Ltd* [1932] AC 452, at 506, more directly:

“Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which had been

taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest other measures less burdensome to him might have been taken.”

- 13.15 In applying these propositions in law the Tribunal considers that the attempts of the Claimant firstly to sell the remaining HRC to Kobylin and then secondly to Hotmetal were reasonable steps and were fulfilling its duty to mitigate its losses. The sale of the remaining HRC at the Port of Astrakhan was promptly effected after the Respondent’s default on 27 March 2012 and for a price just over the contract prices in Contracts 124 and 131. Moreover, there was no evidence before us of any doubts known to the Claimant, at the time of entering the Kobylin contract, about the likelihood of it succeeding.
- 13.16 Turning to the Hotmetal contract the Tribunal notes that this contract was not entered into by the Claimant until a long time after the Respondent’s default on 27 March 2012 and during that time there certainly was considerable deterioration in the HRC as it was stored in the open and under snow during the winter of 2012/13 at the load Port of Astrakhan near the Caspian Sea. However, the evidence before the Tribunal is that to some extent the Kobylin contract was still alive in the sense that Kobylin was still paying for the HRC up to 30 April 2013. Moreover, no evidence was put before the Tribunal supporting the proposition that the Claimant could and should have sold the remaining HRC to another buyer at a closer date and at a better price.
- 13.17 As such, the Tribunal finds that the Claimant’s conclusion of the Kobylin contract was reasonable mitigation of its losses under the Contracts. To date, however, the Claimant’s losses have only been mitigated to the extent of the

sums paid by Kobylin, namely USD 3,990,471.98. Mr Timmermanns gave evidence that the Claimant had commenced LCIA arbitration against Kobylin. It was therefore necessary for us to consider whether we should take account of the possibility of the Claimant recovering further sums from Kobylin in assessing the damages payable by the Respondent.

- 13.18 A party is not generally expected to engage in speculative litigation to mitigate its loss (see the general principle at Tettenborn, *Butterworths Law of Damages* para.5.79). Further, there was no evidence before us that the claim by the Claimant against Kobylin was anything more than speculative, so far as prospects of recovery were concerned. Indeed, there was positive evidence which suggested that the present sanctions regime in respect of Iran made it practically impossible for Kobylin (as an Iranian company) to pay the Claimant. We do not consider that the prospects of that situation changing are more than speculative.
- 13.19 Accordingly, the Kobylin contract should be treated as mitigating Grass' loss only to the extent of the USD 3,990,471.98 actually received to date by the Claimant and Grass' loss is not be regarded as capable of being further avoided (for the purposes of our assessment of damages) through further payment by Kobylin.
- 13.20 The Tribunal concludes that, once it became apparent that Kobylin was not going to perform the Kobylin contract any further, it was reasonable mitigation for the Claimant (through Grass ME) to sell the remaining HRC to Hotmetal. The Claimant accepts that it has to give credit for the sums received from Hotmetal by Grass ME, so it is unnecessary to consider the relationship between the Claimant and Grass ME in any greater detail. The HRC sold to Hotmetal had clearly degraded and the Claimant's expert Mr Greenhouse was not in a position to say that the sale price achieved was unreasonably low. In any event, the sale price was only USD 20-30pmt below the market price, which the Tribunal does not consider was unreasonable in the circumstances.

We note Mr Greenhouse's view that the remaining HRC should have been covered while stored outside but in all the circumstances in which the Claimant found itself we cannot conclude that the failure to store the goods in this manner was a failure to mitigate.

- 13.21 On the law relating to remoteness of damage the Tribunal is quite happy to accept the citation cited by Dr Blanche from Goode on Commercial Law. In paragraph 4 on page 134 Professor Goode stated:

“Not all loss suffered consequent upon a breach is recoverable. Contract law requires a sufficient connection between the breach and the loss, and has developed well defined rules for determining whether the loss is too remote. The loss must be causally connected to the breach, so that if it would have occurred in any event, it is not recoverable. Equally, if the loss resulted from some intervening act of the claimant or a third party which the defendant could not reasonably have foreseen as a consequence of the breach, it will be too remote.”

In those circumstances Professor Goode goes on to state:

“The effect of the breach [would have been] exhausted and replaced by the intervening act as the ‘proximate cause’.”

- 13.22 The short answer to the Respondent's case that the Claimant's losses are too remote is that remoteness has no application where mitigation is concerned. The Respondent did not suggest, and could not have suggested, that the Claimant's loss of bargain upon termination of the Contracts was too remote. The Claimant sought to mitigate that loss by entering into the Kobylin and Hotmetal transactions. It is sufficient for the Claimant's case that its action in doing so was reasonable. For the reasons expressed above the Tribunal is quite clear that the Claimant did properly exercise its duty to mitigate its

losses and none of the losses which it is claiming in these Arbitrations should be deemed to be barred on the grounds of remoteness.

The Claimant's Damages

13.23 It follows from this analysis that the Claimant is entitled to be awarded damages in respect of the difference between what would have been received under the Contracts for the Anzali HRC and (i) what was actually received from Kobylin for that HRC and (ii) what was also received from Hotmetal (at a price of USD 570pmt) in relation to the remaining HRC as stored at the Port of Astrakhan. Had the Contracts been completed the Claimant would have received from the Respondent the balance of USD 9,139,427.14 (USD 4,447,206.40 on Contract 124 + USD 4,692,220.74 on Contract 131). In the event, the Claimant received USD 3,990,471.98 from Kobylin and USD 2,821,180.80 from Hotmetal (totalling USD 6,811,652.78). Hence, the total of the Claimant's damages comes to USD 2,327,774.36 (USD 9,139,427.14 – USD 6,811,652.78).

13.24 Turning to the Claimant's claim for storage charges, a variety of figures have been put before the Tribunal. In its Requests for Arbitration, under Contract 124, the Claimant put forward the provisional figure of USD 70,000 for the storages costs and under Contract 131 a provisional figure of USD 35,000. Then in its Statement of Claim the Claimant put forward the figure for the storage charges at USD 217,776.04 and before us in the Oral Hearing Mr Smith put forward the figure for the storage costs at USD 217,550. He also drew attention to a calculation for storage costs as at 31 January 2013 at USD 346,850 - in an email from LISW a figure which also included also the storage costs for iron rods which do not form part of the claims made in these Arbitrations. At the very end of the Oral Hearing Mr Smith offered to produce a schedule, containing the storage costs, which he proposed to put before Dr Blanche for agreement. After the Oral Hearing, the Tribunal did not receive

any schedule of the dates for storage and how they were calculated, but merely a total figure of USD 153,679.46, which as “a figure” Dr Blanche accepted on behalf of the Respondent, but continued to contest the basis upon which it had been calculated. The basic problem, therefore, remains that the Tribunal has not received evidence on the dates for the storage, the calculation of them nor any proof of the payment of storage charges by Grass to LISW. Consequently the Tribunal rejects the Claimant’s claims for the storage charges.

14. INTEREST

14.1 In its Statement of Claim the Claimant sought interest charges, at either simple or compound rates, at 10%. Although pressed at the Oral Hearing for evidence in support of interest being awarded at 10%, the Claimant was unable to submit any supporting evidence. The Tribunal has considered the application made by Mr Smith on behalf of the Claimant to defer the determination of interest until a later date, but it rejects that application on the basis that the Claimant has had sufficient time to organise its case and present evidence in this respect. Alternatively Mr Smith and Dr Blanche agreed, at the end of the Oral Hearing, that the Tribunal could, using its best endeavours, set the rate of interest which it believes is applicable for the Claimant’s claims. Accordingly the Tribunal fixes the interest at 3.5% which it holds should be compounded quarterly from the termination date of 27 March 2012 until the full payment of damages being awarded in this Award.

15. COSTS

15.1 The costs of the arbitration (other than the legal or other costs incurred by the parties themselves), have been determined by the LCIA Court, pursuant to Article 28.1 of the LCIA Rules, to be as follows:

Registration fees	£3,500.00
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LCIA's administrative charges	£14,630.76
Tribunal's fees	<u>£120,886.25</u>
Total costs of arbitration	<u>£139,017.01</u>

- 15.2 Before the Tribunal, the Claimant Seller has succeeded on liability – the Respondent Buyer conceding this on the final day of the Oral Hearing – and also succeeded on quantum, except in relation to the storage charges. It is, therefore, right that the Respondent Buyer should pay the arbitration, legal and other costs incurred in these Arbitrations.

ACCORDINGLY WE MAKE AND PUBLISH THIS AWARD AND DIRECT AS FOLLOWS:

- (1)That the Respondent Buyer forthwith pays to the Claimant Seller damages in the sum of USD 2,327,774.36 (two million three hundred and twenty seven thousand and seven hundred and seventy four US dollars and thirty six US cents) together with compound interest thereon, at quarterly rests, at the rate of 3.5% (three point five percent) from 27 March 2012 until the date of the full payment of damages.**
- (2)That the Respondent Buyer shall pay to the Claimant Seller the portion of the costs of the arbitration, as determined by the LCIA Court, which have been funded by the Claimant.**
- (3)That the legal and other costs in these arbitrations should be for the account of the Respondent Buyer, such costs to be agreed by the parties or, in the absence of agreement, to be determined by the Tribunal on written submissions being made to it.**

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

LORD HACKING
CHAIRMAN

[JAMES UPRIGHT] QC

[DANIEL HONEST] QC

18th December 2014