ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 14073/EBS

INDAGRO S.A. V. VIVA CHEMICAL CORPORATION, INC.

FINAL AWARD

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01 May 2007

Tribunal:
Tim Taylor (Sole arbitrator)

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Final Award

1THE PARTIES

Indagro

1.1. The Claimant, Indagro S.A. ("Indagro"), is a Swiss Corporation with its principal place of business at 14 Chemin de Normandie, Geneva, Switzerland. It is engaged in the business of trading commodities, including sulphur. It has a satellite office at 130 Syngrou Avenue 17671, Athens, Greece.

1.2. Indagro is represented by Andrew S. de Klerk of Frilot, Partiridge, Kohnke & Clements, New Orleans,USA.

Viva

1.3. The Respondent, Viva Chemical Corporation ("Viva"), is incorporated in New Jersey with its principal place of business at 1512 Palisade Avenue, Suite 5M, Fort Lee, New Jersey 70024, USA and is also engaged in the business of trading commodities. It has a satellite office in Moscow, Russia.

1.4. Viva is represented by Andrew Meads of Middleton Potts Solicitors, London, England. Viva was previously represented by Mr. Gary Lerner of Lerner & Kaplan, PLLC., New York, USA, until 13 March 2006.

2 THE ARBITRATION AGREEMENT

The Joint Venture Agreement

2.1. The dispute giving rise to this arbitration arises out of an agreement between the parties, entitled JV Agreement # 01201/020/04 dated 25 August 2004 (the "JVA"). The object of the JVA was the purchase and resale of sulphur in bulk.

2.2. The JVA contains the following arbitration clause:

"[A]ny disputes that cannot be settled amicably to be referred for Arbitration at ICC Paris in English language".

The Place of Arbitration

2.3. By agreement between the parties recorded in the Terms of Reference of 24 April 2006, the place of this arbitration is London.

Substantive Law

2.4. The JVA does not contain an express choice of applicable law. By email exchange of 13 and 14 of June 2006, the parties agreed in writing that

"English law shall be applicable to the Contract the subject of their dispute and to any remedy urged by either party, save that the conflict of law rules applicable under English law shall not apply."

3 BACKGROUND AND OUTLINE OF THE DISPUTE

3.1. During 2004 Indagro used its contacts in the senior management of Gazprom (The Russian conglomerate) to secure the opportunity to acquire bulk sulphur from refineries operated by Gazprom subsidiaries. A company called Fedcominvest had for some time had an effective monopoly on the output of some four million Metric Tons ("MT') a year. Indagro was offered the opportunity to acquire 25% of that output.

3.2. Indagro had experience in selling sulphur internationally for fertilizer production. However, it lacked experience and capacity to handle the inland transport and logistics. Viva was identified as a suitable partner as its subsidiary Novochimtrans (which shared the same senior management as Viva) operated a rail transport and logistics business.

3.3. On 14 December 2004, Viva and Indagro each concluded contracts to purchase sulphur from Gazprom's subsidiary, Gazexport LLC, FCA Aksarayskaya 2 railway adjacent to the Astrakhangazprom refinery. By addenda dated 20 December 2004, the quantities to be sold under these contracts during 2005 were to be a total of 250,000 MT granular sulphur sold to Indagro and 750,000 MT crush lump sulphur sold to Viva. The addenda set out monthly delivery quantities rising in increments to the annual total, with precise quantities to be subject to separate individual addenda. The dispute concerns crush lump sulphur.

3.4. The JVA was originally contracted in August 2004 as a pilot project to handle an initial consignment of 50,000 MT from the Orenburg refinery, acquired before the parties entered into the December 2004 contracts with Gazexport. The structure of the agreement entailed Viva purchasing the sulphur on FCA terms from the Kargala rail depot close to the refinery and selling it to Indagro FOB Kavkaz. Indagro was responsible for selling the sulphur internationally on CFRFO terms and the parties were to share equally the loss or profit resulting from the international sales after taking into account the purchase, transport and other direct costs.

3.5. For subsequent consignments after the initial 50,000 MT, the parties executed separate addenda to the JVA which incorporated it as a framework agreement. The essential structure of the JVA, thus remained the same with Viva expressed to be selling sulphur on FOB terms to Indagro and the parties sharing equally in the profits or losses resulting from the subsequent international sales to be contracted by Indagro.

3.6. Until February 2005, Kavkaz remained the loadport, but after encountering logistical difficulties there, the parties agreed to switch to Kerch where deliveries commenced in February 2005. It is common ground, therefore, that references to Kavkaz in the JVA should be read as references to Kerch for purposes material to the dispute.

3.7. The consignment of sulphur to which the dispute relates is part of a consignment of 30,000 MT, which is the subject of Addendum 14 to the JVA dated 9 March 2005. It is common ground that Indagro pre-paid directly to Gazexport the $7 per MT FCA purchase price of this consignment and also paid direct to Novochimtrans $28.50 per MT inland transport costs.

3.8. Some 18,000 MT of the consignment (the "Cargo") were sold by Viva, who received the sale proceeds. Some 6,000 MT of the Cargo were sold by Viva to a company called Titan in the Ukraine in May 2005. The balance was sold by them to Fedcominvest on or about 7 June 2005.

3.9. It is common ground that when these sales took place, a backlog of over 20,000 MT sulphur had accumulated at Kerch, which only had fixed storage facilities for 10,000 MT. Viva blamed this on Indagro's failure to secure sales. Indagro blamed it on Viva’s handling of the transport logistics.

3.10. As will appear, the nub of the dispute is that Indagro claims that it was the sole owner of the Cargo and that Viva was not authorised to sell the Cargo and retain the sales proceeds. Indagro seeks to be reimbursed in full for the purchase, transport and related costs of the Cargo. Viva’s case is that it was entitled to sell the Cargo and to retain the sales proceeds and that it has used them to pay expenses of the joint venture. Accordingly, Viva contends that Indagro has no claim against it.

4 PROCEDURAL HISTORY

Commencement of the arbitration and the parties’ initial submissions

4.1. Indagro commenced this arbitration by a Request for Arbitration dated 18 October 2005 (the "Request"). Indagro subsequently agreed that the Request would stand as its full Statement of Claim within the meaning of the ICC Rules.

4.2. Viva did not file an Answer to the Request by an extended deadline set by the ICC International Court of Arbitration (the "ICC Court") of 12 January 2006.

4.3. In accordance with Article 6(2) of the Rules, the ICC Court decided at its session of 20 January 2006

that this arbitration should proceed.

Appointment of the Arbitrator and the Administrative Secretary

4.4. On 10 February 2006, the ICC Court appointed Mr. Tim Taylor of SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE, as Arbitrator upon the proposal of the ICC United Kingdom National Committee in accordance with Article 9(3) of the ICC Rules.

4.5. On 24 February 2006, Mr. Gordon Blanke of SJ Berwin LLP was appointed Administrative Secretary with the parties' consent. The parties agreed to the Administrative Secretary's attendance at arbitral hearings.

4.6. The file in this arbitration was transmitted to the Arbitrator on 13 February 2006.

The parties' further submissions and settlement of the Terms of Reference pursuant to Art 18 of the ICC Rules

4.7. Following the Tribunal's direction to Viva to file an Answer to the Request by 9 March 2006, Viva served a submission entitled "draft Terms of Reference" ("Viva's Submission") on 8 March 2006.

4.8. On 10 March 2006, the Arbitrator directed that Viva's Submission stand as its Answer and be treated as its "most recent submission" for the purpose of establishing the Terms of Reference under Article 18 of the ICC Rules.

4.9. In accordance with Article 18 of the ICC Rules, Terms of Reference were signed by the parties and the Arbitrator on 24 April 2006.

4.10. Following the settlement of the Terms of Reference, a provisional timetable was established for the further conduct of the arbitration. Following further procedural orders, disclosure of documents and the exchange of further submissions pursuant to those orders, a hearing was scheduled for 11 July 2006.

4.11. Each of the parties served short summaries of the material evidence to be adduced by each Witness of Fact dated 30 June and 10 July 2006 respectively.

Advances on costs and withdrawal of Viva's counterclaims pursuant to Art. 30(4) of the ICC Rules

4.12. Indagro paid its full share of the advances on costs fixed by the ICC Court pursuant to Article 30 of the ICC Rules. Viva failed to make the requisite payments despite repeated reminders from the Secretariat of the ICC Court (the "ICC Secretariat").

4.13. By letter to the parties of 25 October 2006 and after consultation with the Arbitrator, the Secretary General of the ICC Secretariat granted Viva a final time limit of 15 days from receipt of the letter for payment of the outstanding advance on costs.

4.14. By letter from the Secretary General of the ICC Secretariat to the Arbitratorof the same date, the Arbitrator was invited to suspend his work with respect to the counterclaims, as Viva had failed to make payment of its advance on costs. Accordingly, the Arbitrator suspended his work with respect to the counterclaims with effect from that date.

4.15. By letter to the parties of 13 November 2006, the ICC Secretariat confirmed that Viva had failed to comply with the final time limit without raising any objections to the application of Article 30(4) of the ICC Rules and that therefore, Viva's counterclaims were now considered withdrawn pursuant to that Article.

The hearing of 11 July 2006

4.16. On 11 July 2006, an evidentiary hearing took place at SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE, UK. In attendance before the Arbitrator were Mr. Theo del Conte, Indagro's managing director, Mr. Joseph Efthimiades, Indagro's trader, Mrs. Esti Martinez, Indagro's in-house counsel and corporate representative, and Mr. Constantin Lutsenko, Viva's former Vice-President.

The Consent Order and the documents-only procedure

4.17. Following opening submissions at the hearing, an agreement was reached between the parties for the further conduct of the arbitration to take place on a documents-only basis, subject to the liberty of either party to apply to show cause why an oral procedure should be reinstated. Upon the parties' application, the agreement was recorded in a consent order (the "Consent Order").

4.18. In applying for the Consent Order, it was represented by Counsel for the parties that an agreement had been concluded for reciprocal personal guarantees to be put up by Mr. Lutsenko and Mr. Veniamin Nilva, Viva's President, on behalf of Viva, and Messrs Theo del Conte and Giovanni del Conte (Indagro's Chairman) on behalf of Indagro by way of security for payment of any award or amount agreed due.

4.19. By letter of 13 July 2006, Viva informed the Arbitrator that Mr. Nilva was, in fact, not prepared to give a personal guarantee on behalf of Viva as a basis for entering the Consent Order and that Mr. Lutsenko had been mistaken in his belief at the hearing that Mr. Nilva would agree to such a guarantee. In subsequent correspondence, Indagro asserted that it expressly reserved its rights (i) to discontinue the documents-only procedure and revert to an oral procedure as provided for under the Consent Order; (ii) to preserve its original claims; (iii) to claim the costs of the wasted evidentiary hearing of 11 July 2006; (iv) to apply for security from Viva; and (v) to be awarded any ancillary relief that may be appropriate. Indagro further asserted that due to Viva's conduct in this arbitration, Viva had lost its right to any claim for set-off.

4.20. In accordance with the Consent Order and by the relevant deadlines as subsequently varied by their mutual agreement, the parties exchanged statements of account with supporting materials showing what sums fall to be accounted on each of their cases under the JVA. Accordingly, the parties made their respective submissions on 3 October 2006, followed by a further reply by each of them on 24 October 2006.

Indagro's application for costs and reversion to the oral procedure

4.21. In an application to the Arbitrator of 24 October 2006, Indagro applied for (i) a reversion to an oral procedure; and (ii) an interim award for the costs and fees wasted as a result of the abandonment of the evidentiary hearing of 11 July 2006.

4.22. At a telephone hearing on 31 October 2006, the Arbitrator granted Indagro's application to revert to an oral procedure as provided for under the Consent Order. The Arbitrator declined to make an interim award on costs as applied for by Indagro and reserved costs to be dealt with in the Final Award. The Arbitrator further ordered that all documentary evidence the parties sought to rely upon during the resumed hearing be submitted to the Arbitrator beforehand as directed, unless cause be shown to the contrary upon application by a party.

4.23. Following the parties' agreement to that effect, the Arbitrator directed the resumption of the evidentiary hearing to take place on 7 and 8 December 2006 at the offices of SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE.

The resumed hearing

4.24. On 4 December 2006, Indagro served a Witness Statement of Mr. Giovanni del Conte. The parties agreed that Mr. del Conte's examination would be effected by telephone.

4.25. The hearing was resumed at, 10 Queen Street Place, London EC4R 1BE, UK, on 7 December 2006, followed by a second hearing day on 8 December 2006. In attendance before the Arbitrator were Mr. Theo del Conte, Mr. Joseph Efthimiades, Mrs. Esti Martinez, Mr. Constantin Lutsenko, Mr. Pavel Miranov, former deputy director of Novochimtrans and the parties' legal Counsel.

4.26. Mr. Theo del Conte, Mr. Efthimiades and Mr. Giovanni del Conte (by telephone from Turkey) gave evidence on behalf of Indagro. Messrs. Lutsenko and Miranov gave evidence on behalf of Viva.

4.27. At the conclusion of the resumed hearing, the Arbitrator directed the parties to serve post- hearing briefs by 9 January 2006, to include briefing and supporting material on claims for costs, including the parties' contentions as to the costs wasted by the adjournment of the evidentiary hearing of 11 July 2006, to be followed by reply briefs by 17 January 2006.

The parties' post-hearing submissions

4.28. Following agreed extensions of time, the parties exchanged and served on the Arbitrator their Post-hearing Briefs on 11 January 2007, followed by Reply Briefs on 17 January 2007. Together with its Post-hearing Brief, Indagro submitted an Affidavit of Mr. Oleg Goncharenko dated 9 January 2007. As part of its Reply Brief, Viva submitted Affidavits of Ms. Tatiana Kuzutsova, Viva's Moscow-based assistant manager, and Ms. Victoria Rulina, former project manager of Viva, dated 17 January 2007 respectively.

4.29. Indagro made separate submissions on costs dated 18 January 2007, supplemented by further submissions (i) on costs wasted by the adjournment of the evidentiary hearing of 11 July 2006, dated 19 January 2007 and (ii) on legal costs, dated 22 January 2007.

4.30. Viva made further corrective submissions to the Arbitrator with respect to its Post-hearing Brief, dated 18 January 2007.

4.31. The parties exchanged further comments on Indagro's submissions on costs on 25 January 2007.

Extension of time limit for Final Award pursuant to Art. 24(2) of the ICC Rules

4.32. The Court has extended the time limit for rendering the Final Award to 31 July 2007.

Closure of the proceedings pursuant to Art. 22(1) of the ICC Rules

4.33. In accordance with Article 22(1) of the ICC Rules, the Arbitrator declared the proceedings in this arbitration closed on 2 February 2007.

5 THE PARTIES CASES

Indagro's case

5.1. Indagro claims reimbursement of $678,900.91 as its costs of the Cargo.

5.2. Indagro's case is that:

1) The FOB sale and payment terms of the JVA were amended by consent of the parties, such that Indagro paid the purchase price and inland transportation costs of the Cargo.

2) As a result of these changes to the JVA, Indagro owned the Cargo when Viva sold it.

3) Viva had no contractual right to sell the Cargo, and Indagro did not consent to its sale, either beforehand or after the event.

4) Viva used false documents to obtain Indagro's payment for the Cargo.

5) Viva cannot mount a successful defence of set-off against Indagro's claim because:

a) the defence is not legally available to Viva in the circumstances, and;

b) even if the defence was legally available, Viva has failed to prove the expenditure/liabilities it seeks to set off and/or has failed to give adequate credit for payments made by Indagro.

5.3. As indicated in paragraph 4.7 above, it is common ground between the parties that the Cargo was part of 30,000 MT for which Indagro paid $7 per MT direct to Gazexport, the FCA seller, and had also paid $28,90 per MT direct to Novochimtrans for inland transport costs.

Ownership and property rights in the Cargo

5.4. The FOB sale regime of the JVA for the 30,000 MT was changed by agreement because Viva could not finance the purchase and transportation costs and because of Indagro's banking requirements. Indagro paid for the 30,000 MT before it left the refinery, paid for the transport to Kerch and paid to insure the goods ex-refinery. In consequence, all property rights in the goods were vested in Indagro on behalf of its financing bank, Société Générale.

Knowledge and authorisation of the sales to Titan and Fedcominvest

5.5. lndagro relies on the evidence of Mr. Theo and Mr. Giovanni del Conte that they did not know about the sales to Titan and Fedcominvest before 15 June 2005, and did not authorise the sales either before or after the event.

5.6. lndagro relies in particular upon:

(i) the absence of any prior reference in the documents to the sales to Titan or Fedcominvest;

(ii) the misdating as 7 June 2005 of a fax sent by Viva to lndagro on 21 June 2005 (HB 191); and

(iii) the production of false documents to obtain payment for the 30,000 MT.

lndagro submits that these factors discredit the evidence from Viva's Witnesses of Fact to the effect that lndagro knew and approved of the sales.

5.7. lndagro asserts the following causes of action, all as giving rise to its entitlement to claim reimbursement of the costs of the acquisition of the Cargo and/or damages equal to that amount:

(i) breach of contract: the sales of the Cargo are characterised as both a fundamental and repudiatory breach of the contract giving rise to its termination and/or frustration;

(ii) failure of consideration;

(iii) breach of a bailment obligation;

(iv) breach of fiduciary duty;

(v) conversion;

(vi) fraud;

(vii) theft.

Set-off

5.8. lndagro contends that, the defence of set-off is unavailable to Viva:

(i) because Indagro's claims include non-contractual claims (including claims of a proprietary nature);

(ii) because the dishonest conduct alleged against Viva would make it unjust to allow Viva to avail itself of a set-off in all the circumstances.

The accounting process

5.9. Indagro submits that, even if its legal objections to the defence of set-off are not sustained, Viva has not adequately proven qualifying expenditures/liabilities or properly accounted for expenditure by Indagro in arriving at the sums which it seeks to set off.

Viva's case

5.10. Viva submits that the issues between the parties that require determination are (in substance):

(i) whether Indagro was able to sell the Cargo, and whether it, in fact, did so;

(ii) if Indagro could not/did not sell the Cargo, why not?

(iii) whether Viva was entitled to sell the Cargo to mitigate losses accruing to the parties under the

JVA;

(iv) whether Indagro approved or knew about the sales of the Cargo to Fedcominvest and Titan;

(v) whether, having sold the Cargo, Viva is entitled to set the proceeds of sale against losses accrued and/or accruing to the joint venture;

(vi) whether Indagro is entitled to recover from Viva the proceeds of the sale of the Cargo or part of them and/or damages.

Earlier performance of the JVA

5.11. Viva attributes the logistical problems with performance to Indagro's failure to procure sates and not to any failure on the part of Viva, but accepts that the problems encountered at Kavkaz do not bear on the issues for determination or form the basis of any claim.

Financing

5.12. Viva acknowledges that the terms of the JVA "were *varied in performance in a number of respects",* but contends that nothing turns on the fact that Indagro and not Viva financed the purchase and inland transport costs of the Cargo (whether the Arbitrator accepts Viva's evidence that it was always intended that Indagro would finance these costs, or Indagro's evidence that this was not originally intended, but Indagro later consented to it). In its Post-hearing Reply Brief, Viva contends that, notwithstanding the prepayment for the Cargo by Indagro, the Cargo was joint venture property.

5.13. Also, in connection with financing, Viva places reliance as *"fundamentally important"* on evidence that it contends shows that Indagro was willing to manipulate the information it presented to its bankers in order to preserve its lines of credit.

Indagro, not Viva was in breach of contract

5.14. Viva denies that it breached the JVA, and claims to have been entitled to sell the Cargo either because it was authorised by Indagro or because it was entitled to do so by way of mitigation of losses accruing to the joint venture. To the contrary, it asserts that Indagro was in breach of contract in a number of respects, entailing in particular:

(i) breach of a term of the JVA that Indagro would sell the sulphur at the highest possible price;

(ii) breach of a representation inducing the JVA that Indagro would be able to sell the sulphur internationally at a profit;

(iii) failure to pay $80,903.44 as its agreed share of losses on the resale of the initial 50,000 MT sulphur, which losses are said to have arisen from Indagro's negligent handling of its sale;

(iv) failure to repay $70,000 advanced by Viva to Gazexport; and

(v) failure to arrange suitably phased liftings from Kerch to maintain a profitable cycle of rail deliveries from the refinery to the port, leading to a critical problem of stockpiles of sulphur at the port requiring costly storage and leading to the port authorities threatening to seize the Cargo.

The sales to Fedcominvest and Titan were not breaches

5.15. Viva relies on the evidence of Mr. Lutsenko and (in particular) an e-mail dated 16 June 2005 from Mr. Giovanni del Conte (HB 174) as proving that Indagro knew of and approved the sales to Titan and Fedcominvest.

5.16. Viva points to the absence of protest in the email and subsequently as negating any suggestion that the sales were an *"unexpected theft"*. Viva contends that the presentation by Indagro of the e-mails and its reaction as an exercise in damage limitation is barely credible.

5.17. Viva contends that Indagro's case that the sales were unknown and a fraud must fail and that Indagro should be estopped from denying that the sales were legitimate because of its conduct at the time.

The false documents

5.18. Viva denies that it produced false documents and contends that Indagro and not Viva had the need and motive to produce them. It also had the ability to do so through the alleged presence of its employee Mr. Oleg Goncharenko at Viva's offices.

Viva did not prevent Indagro from performing

5.19. It is denied that Viva's conduct prevented Indagro from performing the JVA or resulted in their failure to sell sulphur. In particular, it is denied that there was any repudiatory breach of contract or that Viva's conduct in making the sales of the Cargo was ever treated as a repudiatory breach by Indagro. Indagro affirmed the contract after the sales.

5.20. It is asserted that Viva was entitled to mitigate its losses arising from Indagro's breaches in failing to procure sales, by making sales itself (which it says Indagro approved in any event).

Viva did not profit from the sales of the Cargo

5.21. Viva's case is that the proceeds of the sales were lawfully used by it to defray joint venture expenses.

Indagro's suggested sale contract to Viva and the opposing release

5.22. Viva draws attention to Mr. Lutsenko's evidence as to his discomfort with Indagro's request to document the sale of the Cargo, after the event, as entailing an intermediate sale by Indagro to Viva. Viva asserts that this discomfort was the motive for their requesting a release from Indagro regarding the sales of the Cargo. The request was not made because Viva thought it needed any release *per se.*

5.23. Viva points to Indagro's fax to them of 30 June 2005 (HB 203) as being the first protest against the sales and asserts that it was only sent because Indagro had run out of time with its bank (which was sent a copy).

Claims for lost profit

5.24. Viva asserts that Indagro has failed to prove lost profits or their proximity to the alleged breach and that Indagro's claims for lost profits should be rejected as too remote and not properly particularised or evidenced.

The defence of set-off

5.25. Viva submits that Indagro's entitlement to damages is limited to an entitlement to receive such sum as is necessary to place Indagro in the position in which it would have been if the alleged breach of contract had not been committed. Viva says that this must take into account indagro's obligation to bear losses equally with Viva.

5.26. It contends that this principle of damages cannot be circumvented by Indagro seeking to categorise its claim as a claim for the return of the value of the Cargo.

5.27. The fact that Viva acknowledges that it is procedurally barred from pursuing a counterclaim does not prevent it from relying upon a set-off available by way of defence.

5.28. Viva contends that it is entitled to assert either a defence of contractual set-off at law having regard to the mutual obligations under the JVA or a defence of equitable set-off on the basis of the close connection of its expenditures in connection with the JVA and Indagro's claim for the cost of the Cargo.

5.29. Viva contends that none of the misconduct alleged against it by Indagro strikes at the root of the connection between the claim and the defence of set-off so as to deprive Viva of that defence.

Accounting

5.30. Viva contends that it has proven expenditure sufficient to extinguish Indagro's claim.

Inferences to be drawn from the evidence

5.31. Viva contends that the balance of the evidence supports its contentions that;

(i) The sales of the Cargo were known to Indagro and there was no protest in relation to them;

(ii) there were no thefts of the Cargo or anything approaching that;

(iii) Viva has never concealed details of the sales or retained their proceeds for its own benefit;

(iv) Indagro did not believe it had any cause for complaint as regards the sales and that is the real reason for the lack of protest, not the desire to embark on a damage limitation exercise; and that

(v) the real reason for Indagro's change of position was that Indagro had to present a convincing picture to the bank that would explain what had happened to the bank's collateral and Viva would not collude in that without a release.

Points raised in Viva's Post-hearing Reply Brief

5.32. In its Post-hearing Rely Brief, Viva was able to supplement its case on the individual causes of action relied upon by Indagro as set out in Indagro's Post-hearing Brief.

5.33. In particular, Viva made the following points:

(i) The contract was not repudiated by Viva. Indagro did not purport to bring it to an end but affirmed it.

(ii) Indagro cannot have a restitutionary claim for the monies expended by it as expended under a failed contract as the JVA was valid.

(iii) Indagro's claim for restitution of the sums expended on the basis that there was a failure of consideration is at odds with its assertion that it acquired title to the Cargo; possession should not be confused with title.

(iv) Viva was not bailee and in any event did not carry out any act that would be a breach of any alleged obligation as bailee.

(v) There was no conversion and theft is not a civil cause of action. The connection between the claim and defence is so close that set-off is plainly available as a defence.

(vi) Any obligations of Viva as FOB seller did not affect Indagro's obligation to sell the Cargo and its failure to do so necessitated the sale by Viva.

6 REASONS

6.1. Viva's formulation of the issues between the parties set out in paragraph 5.10 above may be taken as a framework to deal with the parties' submissions.

ISSUE 1: Whether Indagro was able to sell the Cargo and whether it did in fact do so

6.2. Viva contends that it was an express or implied term of the JVA that Indagro should sell the sulphur at the highest available price, and that Indagro was in beach of that term.

6.3. The potential relevance of this allegation is two-fold:

(i) To the extent that this alleged breach could give rise to a claim for damages, the question could then arise whether that claim could be available as a set-off defence to Viva.

(ii) Viva relies on the alleged breach as one justification for their selling the Cargo to mitigate the damage that they say was caused by Indagro's breach of contract.

6.4. The threshold question is: were Indagro in breach of contract for failing to sell the Cargo?

6.5. The applicable written terms of the JVA bearing on this question are to be found in Addendum 14 of 9 March 2005 (HB 95), read together with the original JVA of 25 August 2004 (HB 6-8).

6.6. The structure of the agreement on its face entails, in the first place, an FOB sale on Incoterms 2000 terms by Viva to Indagro of up to 30,000 MT (+/- 5% in Viva's option) crush lump sulphur in bulk. The Addendum provides that it is to be shipped to Morocco (although the original JVA specifies "free *destination").*

6.7. The only express terms which appear to bear directly on Indagro's obligations with regard to onward sales are the following.

"Responsibilities

....The responsibility of the Purchase partner [i.e. Indagro] *commence* [sic] *from the FOB* [Kerch]

port till [sic] *CFRFO positioning of the product.*

Charter party conditions

Charter party conditions will be considered the ones that Purchase partner to the best of their ability will obtain and secure from the owners of each performing vessel according to the loading and shipping terms of [Kerch] *loadport.*

Risks/benefits

Any risks, consequents [sic] *as well as direct or indirect cost arising due to the agreed loading port conditions and or other charter party terms that are to be established between the relevant parties, will be equally shared between sales partner* [i.e. Viva] *and purchase partner.*

Costs

All product costs as well as operational/transactional/logistic costs will [sic] *arise directly or indirectly within the frame of this j. venture agreement will be equally shared between the Sates partner and Purchase partner.*

Profits/losses

All profits and all losses that will arise within the frame of this j. venture agreement will be equally shared between Sates partner and Purchase partner."

6.8. For completeness, it should be observed that there are issues regarding the extent to which the FOB sale terms had been varied by agreement. But these issues do not impact upon the issue of Indagro's responsibility to secure sales.

6.9. There is no express term of the JVA which obliges Indagro to sell product at the highest available price. Nonetheless, construing the JVA as a whole, it is plain that the parties are co-venturers, described as partners, and that the objective of the agreement is to seek to maximise profits for their mutual benefit. Indeed, this is common ground between the parties.

6.10. In that context, the terms which need to be implied in order to give business efficacy to the agreement would include mutual obligations of good faith towards one another in connection with the performance of the agreement and the requirement that each party would act reasonably in discharging their respective responsibilities with a view to achieving a profitable collaboration. The latter obligation, in particular, permits a broad spectrum of the exercise of reasonable commercial judgments by each partner within their allocated sphere of responsibility.

6.11. The commercial failure of the venture is blamed by Indagro on Viva's handling of the logistics from refinery to loadport, and by Viva on Indagro's failure to secure sales and liftings at prices, in volumes and at intervals that would have avoided a backlog of sulphur at the loadport and the associated increase in transport, storage and related costs. Both parties' witnesses also gave evidence as to efforts by their competitor Fedcominvest to sabotage their business by exerting commercial pressure on customers and encouraging disruption to the logistics operations at the

refinery.

6.12. It is unnecessary to venture a view as to which of these features was the cause or predominant cause of the commercial failure of the venture. It is, however fair to say that, when choosing to operate from Kerch, both parties were aware to a greater or lesser extent of the logistical shortcomings of the port and in a position to appreciate that their profit margin could be swiftly eroded if they failed to achieve the desired sales and sequence of liftings.

6.13. The point for decision for immediate purposes, however, is whether Indagro was in breach of its obligation to make reasonable efforts to secure profitable sales. Nothing in the evidence advanced to me supports that conclusion. The commercial failure of the venture appears to have resulted from a combination of normal commercial risks associated with a trading venture of this kind and the breakdown of the relationship between the parties which resulted from the events giving rise to this dispute.

6.14. In the light of this finding, the issue framed by Viva of whether Indagro was able to sell the Cargo, becomes moot.

6.15. The subsidiary question of whether Indagro, in fact, sold the Cargo does theoretically have the potential to affect the question of who had title to the Cargo when Viva concluded the sales to Titan and Fedcominvest.

6.16. It can be seen that Addendum 14 was signed by Viva at Indagro's request on 9 March 2005 (HB 94, 95). The e-mail from Indagro Athens to Victoria Rulina at Viva's Moscow office on 9 March says *"please send us Addendum to our frame Contract for the 30000 MT Crush Lump to be shipped to Morocco".* The e-mail is headed *"SULPHUR ex GAZEXPORT to OCP".*

6.18. Mr. Joseph Efthiamades gave evidence that the financing for the purchase of the 30,000 MT from Gazexport and its transportation costs was secured from Société Générale against, *inter alia,* the OCP contract (hearing transcript 7/12 p 85). It seems plain, therefore, that Addendum 14 of 9 March 2005 and Viva's invoice to Indagro of 2 March 2005 (HB 77) both related to the purchase of 30,000 MT envisaged at that time as being earmarked for the contract with OCP.

6.19. Mr. Theo del Conte gave evidence (hearing transcript 7/12 p 61) that he had later learned from OCP that Fedcominvest were threatening to cut off supplies to them if they proceeded with this contract. His e-mail describing his conversations with representatives of OCP is dated 24 March 2005 (HB 108-111). It can be seen that this was very shortly after OCP had faxed Indagro on 22 March 2005 requesting them to nominate a vessel for the April lifting of the 20-30,000 MT.

6.20. Mr. Theo del Conte also gave evidence of Indagro's contract with PFI (Phosphoric Fertilisers Industry SA) dated November 2 2004 (HB 23-26) for an initial 40,000 MT CFR FO two Greek ports, which was increased to 60,000 MT in January or February 2005 (HB 63 and hearing transcript 7/12 at pp 52 and 86). When asked by Mr. de Klerk whether the cargo sold to Fedcominvest and Titan was cargo that he either could have or had already sold, his reply was: *"It was already sold of course. There were contracts with PFI that covered that balance....."*.

6.21. It was also in evidence that just over 6,000 MT was laden aboard MV Cenk Sener against the PFI

contract in June 2005, at the same time as the cargo sold to Fedcominvest was being loaded (see e.g. HB 175).

6.22. It can be seen from the schedule of cargos shipped to PFI at HB 175 that by April 2005, more than 50,000 MT of the 60,000 MT sold to PFI had already been shipped, so that it does not appear to be the case that the 18,000+ MT sold to Titan and Fedcominvest could all have been appropriated to the PFI contract. It is also evident that there was considerable doubt over whether OCP would in fact honour the contract for which the 30,000 MT invoiced to Indagro by Viva on 2 March 2005 had originally been earmarked.

6.23. At all events, it is plain as a legal matter that there had been no unconditional appropriation of the 30,000 MT purchased from Gazexport LLC to any particular onward sale contract concluded by Indagro and no question of any part of that consignment, such as the 18,000+ MT sold to Titan and Fedcominvest, having already been sold to either OCP or PFI. This issue, therefore, can have no impact on the question of who had title to the Cargo when Viva contracted the sales to Titan and Fedcominvest.

6.24. As a factual matter, it is also evident that there was considerable doubt as to whether the backlog of sulphur that was accumulating at Kerch in April and May 2005 would be lifted under the OCP and PFI contracts.

ISSUE 2: If Indagro could not/did not sell the Cargo, why not?

6.25. Given the finding that Indagro was not in breach of contract for failing to sell the Cargo, this issue also becomes irrelevant to the determination of the dispute.

ISSUE 3: Whether Viva was entitled to sell the Cargo to mitigate losses accruing to the parties under the JVA

6.26. In the absence of a relevant breach of contract by Indagro, the question of Viva having any obligation and/or right to sell the Cargo as a means to mitigate losses does not arise. Leaving aside the question of specific authorisation by Indagro (which is the subject of Issue 4), this issue, therefore, distils itself into the question, did the JVA confer a right on Viva to sell the Cargo?

6.27. In this respect, the terms of the JVA leave little room for doubt. Onward sales of any cargo to which Viva's entitlement to share in losses and profits attached were to be the responsibility of Indagro (irrespective of the precise legal mechanisms of initial acquisition of the cargo from the refinery). It is common ground between the parties that the Cargo was one to which the profit and loss sharing rights and obligations under the JVA attached, and Viva has argued that Indagro had a positive contractual obligation to sell the Cargo at the highest possible price. Accordingly, the JVA did not permit Viva to sell the Cargo.

6.28. It follows from this conclusion that any right of Viva to sell the Cargo could only have resulted from

a specific express or implied authorisation from Indagro.

ISSUE 4: Whether Indagro approved or knew about the sales of the Cargo to Fedcominvest and Titan

6.29. Viva's case that Indagro knew of and approved the sales to Titan and Fedcominvest rests on two limbs:

1) the testimony of Mr. Constantin Lutsenko, and;

2) inferences which Viva seeks to draw from the correspondence and behaviour of Indagro after it admittedly came to learn of the sales.

Mr. Lutsenko's evidence regarding Titan

6.30. Having explained that Viva introduced the Japanese concern Itochu to Indagro as a potential purchaser (a matter accepted by Mr. Theo del Conte in his evidence), Mr. Lutsenko gave evidence (hearing transcript 7/12 p 142) that he had informed Mr. Giovanni del Conte that he wished to approach *"an end user of sulphur in Ukraine, being a company called Titan, because it might give us some kind of an opportunity to breathe, because then we would remove from the port of Kerch at least some of the quantities of sulphur..."*.

6.31. Mr. Lutsenko frankly admitted uncertainty as to whether anyone else at Indagro had been informed, but explicitly confirmed that he had informed Mr. Giovanni del Conte of his wish to approach Titan and informed him that he had approached Titan's commercial director to convince him to purchase sulphur. His evidence was that the suggestion to make the approach was accepted. He went so far as to say that he had suggested that the commercial director should be paid an incentive, and that this "...was *acknowledged and agreed."* In cross-examination, he confirmed that he had not sent the Titan contract to Indagro, but said *"I am absolutely sure that we had the dialogue with Giovanni Del Conte and I told him that we had managed to sell at $49, if I am not mistaken..."* (hearing transcript 7/12 2nd part p 18).

Mr. Lutsenko's evidence regarding Fedcominvest

6.32. Mr. Lutsenko gave evidence that he had not told Mr. Theo del Conte when they met in Kuala Lumpur in early June 2005 that there had been a sale to Fedcominvest, because the sale had happened after he left Moscow and he was unaware of it. He said that he had not been involved in negotiations with Fedcominvest and that it was Mr. Miranov who had informed him that Indagro had consented to the sale (hearing transcript 7/12 p 146). In cross-examination, he confirmed that he had not told Mr. Theo del Conte about either the Fedcominvest or the Titan contracts but suggested that he would have told him about the sale to Fedcominvest in Kuala Lumpur if he had known about it at the time.

Mr. Miranov's evidence regarding Titan and Fedcominvest

6.33. No evidence was led from Mr. Miranov regarding Mr. Lutsenko's evidence that Mr. Miranov had told him that Indagro had approved the sale to Fedcominvest (hearing transcript 8/12 pp 1-4). In cross-examination, he gave evidence that he was not involved in either the sale to Titan or to Fedcominvest (hearing transcript 8/12 p 10).

6.34. In the remainder of his cross-examination. Mr. Miranov acknowledged that he was aware of the movements of goods to Titan and Fedcominvest. He also acknowledged the absence of any reference to those movements in written and oral communications with Indagro. (hearing transcript 8/12 pp 14-18)

Inferences to be drawn from Indagro's communications ana conduct after 15 June 2005

6.35. The several inferences which I am invited to draw from Indagro's communications and conduct after 15 June 2005 when they admit having learned of the sale to Fedcominvest (the most important of which are set out in paragraph 5.31 above) all essentially resolve themselves into the proposition that Indagro either knew of and approved of the sales to Fedcominvest and Titan before they occurred, or ratified the sales by their conduct after the event.

6.36. Having carefully considered both the oral testimony and the documents, I am satisfied that Indagro did not approve the sales of the Cargo by Viva to Titan or to Fedcominvest, either prospectively or retrospectively.

6.37. The salient reasons for this conclusion are as follows.

6.38. Both Messrs del Conte were firm in their evidence and gave me no reason to disbelieve them on this issue.

6.39. The absence of any reference to either of the transactions in written communications between the parties before 16 June 2005 is striking, particularly when contrasted to the level of written dialogue on other aspects of the business being transacted.

6.40. It may well be that Mr. Lutsenko mentioned his initiative to approach a potential purchaser in Ukraine, as he testified. Viva and Mr. Lutsenko were well aware, however, that the terms of the JVA meant that the proper course for them to have followed was to introduce the lead to Indagro, so that Indagro could conclude any onwards sale. This is the approach which it is common ground that Viva took with Itochu.

6.41. Whatever conversations took place between Mr. Lutsenko and Mr. Giovanni del Conte, I do not accept that they can be properly taken as Indagro having authorised Viva to sell to Titan and take the proceeds itself instead of any such sale being contracted by Indagro.

6.42. The position with respect to Fedcominvest is starker. Mr. Lutsenko gave no direct evidence that he had informed Indagro about it. Mr. Miranov did not give evidence as to if or how he claimed to have known that Indagro had approved the sale (which Mr. Lutsenko gave evidence that Mr. Miranov had told him).

6.43. Both parties' Witnesses of Fact gave evidence as to Fedcominvest's efforts to cause the JVA to fail. Mr. Lutsenko gave evidence to the effect that refinery employees were in Fedcominvest's pocket and being incentivised to disrupt the joint venture business (hearing transcript 7/12 2nd part p 13). The notion that the del Contes would have agreed in advance to a sale to Fedcominvest (particularly without there being any documentary evidence of it before the transaction occurred) is inherently improbable.

6.44. The general tenor of the communications between the parties at the time such as the 6 and 8 June 2005 exchange between Giovanni del Conte and Pavel Miranov/Constantin Lutsenko (HB 168-170) indicates that Indagro was concerned to get a detailed understanding of how (and, by implication at least, whether) the sums that it had advanced were, in fact, needed and being applied for the purposes of the joint venture. This makes it particularly unlikely that Indagro would have authorised Viva to sell and receive the proceeds for a cargo in which Indagro's bankers had a security interest in connection with a full recourse exposure of Indagro to the borrowing.

6.45. Taking these matters into account, I am satisfied that the sales to Titan and Fedcominvest were presented to Indagro by Viva after they had occurred as a *fait accompli.*

6.46. I do not accept that the temperate tone of Mr. Giovanni del Conte's e-mail of 16 June 2005 (HB 174) is inconsistent with his having learned of the sale to Fedcominvest for the first time the previous day. He concludes by saying that the course of action which he is urging must be undertaken, *inter alia, "to avoid any legal action against ALL OF US".* This is wholly inconsistent with his reacting to any situation of which he had been forewarned and/or had agreed to in advance.

6.47. Nor do I accept that Indagro's conduct in seeking to have Viva document the transaction as entailing an intervening purchase of the Cargo by them can be taken either as a subsequent ratification of the sales or as the basis for any estoppel preventing Indagro from seeking to assert such rights as it may have concerning Viva's sales of the Cargo.

6.48. For completeness, I should also add that I do not find it necessary to determine the issue of who produced the false documents (to which much attention was directed by the parties). I did not find this issue to be helpful in arriving at a determination of whether or not Indagro knew of the sales of the Cargo. I disagree with Viva's suggestion that Indagro's alleged willingness to manipulate evidence for the banks is a matter of critical importance.

ISSUE 5: Whether, having sold the Cargo, Viva is entitled to set the proceeds of sale against losses accrued and/or accruing to the joint venture

6.49. It appears not to be seriously in dispute between the parties that a defence of set-off can, in principle, be raised in appropriate cases as a substantive defence in circumstances where a party is procedurally barred from pursuing a counterclaim, as in the present case.

6.50. The *locus classicus* for the principal judicial classifications of set-off in English Law since the fusion of Common Law and Equity is to be found in the case of *Hanak v Green* [1958] 2 AH E.R. 141, CA. Morris LJ said at 149:

"The position is, therefore, that since the Judicature Acts, there may be

(i) a set-off of mutual debts

(ii) in certain cases a setting up of matters of complaint which if established reduce or even extinguish the claim and

(iii) reliance on equitable set-off and reliance as a matter of defence on matters of equity which formerly might have called for injunction or prohibition."

6.51. This classification has been helpfully elaborated in *Wood "English and International Set-Off"* (Sweet and Maxwell 1989) pp 6-14. The author labels type (i) as independent set-off, having its origins in the long since repealed Statutes of Set-Off of 1729 and 1735. Independent set-off permits the set-off of unrelated but liquidated or readily ascertainable claims.

6.52. Type (ii) is identified by the author as the common law concept of abatement developed as an exception to the rigid requirements of independent set-off. Type (iii) reflects the parallel development in the Courts of Equity of "equitable set-off" to cover a range of circumstances in which justice would not have been adequately served unless a plaintiff was forced to give credit for a closely related claim by the defendant.

6.53. Since the effect of the Judicature Acts was for abatement and equitable set-off to be administered in the same courts with the principles of equity taking priority, type (ii) has for practical purposes become a subset of type (iii) and is labelled by Wood as "Transaction Set-Off' in the following terms:

"Transaction set-off (abatement, equitable set-off and United States recoupment)

Transaction set-off arises where the reciprocal claims flow out of the same transaction or closely connected transactions, in circumstances, generally, where the creditor claiming his primary claim has defaulted in performance of the very obligation for which he is seeking payment. Unlike independent set-off, the remedy is self-help and neither claim need be liquidated. The seller who claims the price of goods can be required to bring into account damages for defective goods...."p9

6.54. Further examples are cited and the author adds the following:

"The availability of transaction set-off is not unlimited; a debtor may not set off his cross-claim against the creditor's primary claim merely because both claims flow out of the same transaction. There is much subtlety as to which cross-claims qualify for transaction set-off and which do not."

p10

6.55. In the present case, it is plain that the claims of the parties indeed arise out of the same transaction and/or closely connected ones, so that the threshold requirement to the availability of transaction set-off is satisfied.

6.56. The enquiry does not end there, however, and it becomes necessary to grapple with the subtleties of whether or not Viva's cross-claims entitle them to a defence of set-off having regard to the nature of the claims made by Indagro. For that purpose it is necessary to determine:

(i) which of the causes of action alleged by indagro can be sustained;

(ii) what remedies are *prima facie* available to satisfy those causes of action;

(iii) whether transaction set-off is available as a defence; and

(iv) if so, the amount Viva can set off against Indagro's claim.

6.57. Taking this approach, the answer to issue 5 will be determined together with the sixth and final issue identified by Viva.

ISSUE 6: Whether Indagro is entitled to recover from Viva the proceeds of the sale of the Cargo or part of them and/or damages

Breach of contract

6.58. In the light of the earlier findings that Viva had no right under the JVA to sell the Cargo and that Viva was not authorised by Indagro to do so, it follows that the sale of the Cargo by Viva was a breach of contract.

6.59. It is argued by Indagro that the breach was a repudiatory and/or fundamental breach bringing the contract to an end. An argument was also advanced (although not apparently ultimately pressed) to the effect that the contract had been frustrated.

6.60. Viva argued that there was no evidence of any alleged breach having been treated as a repudiatory breach and accepted by Indagro as bringing the contract to an end. To the contrary, Viva contended that Indagro's actions were consistent with their affirming the contract. There was no question of any supervening events having occurred so as to engage the doctrine of frustration. I agree with Viva's contentions in all of these respects. The question of whether or not the breach was a fundamental breach does not add to the analysis of what remedies are available for the breach of contract. However the breach is characterised, I do not consider that it brought the contract to an end.

Remedies for breach of contract

6.61. The substance of Viva's contention is that any entitlement of Indagro to damages is limited to the amount necessary to place them in the position in which they would have been if the breach had not occurred. If the breach had not occurred then, even though the proceeds of sale of cargo would have flowed to Indagro initially (assuming the sales or equivalent sales took place), Indagro would have been required to expend them to defray their share of the expenses, to which Viva contend they applied the proceeds. Accordingly, Indagro would have received none of the sales proceeds. It is said that this principle of the quantification of damages cannot be circumvented by Indagro framing its claim as a claim for the return of the price it paid for the Cargo.

6.62. There are two difficulties with this submission, one of form and the other of substance. The usual contract measure of damages is the amount necessary to place the claimant in the position they would have enjoyed if the contract had been properly performed as opposed to the tort measure of putting the claimant in the position it would have enjoyed if the wrong had not occurred. In this case the contract and tort measure would likely lead to the same financial outcome, and hence the difficulty with Viva's submission in this respect is essentially one of form.

6.63. The substantive difficulty is that an alternative measure of damages to the "loss of bargain" measure is damages for expenditure which has become wasted expenditure as a result of the breach. The former measure is the "expectation" loss and the latter the "reliance" loss identified in the passage from Chitty on Contract cited by Indagro, which makes it plain that a claim for the reliance loss is a permissible alternative to a claim for the expectation loss.

6.64. Whilst it is true to say that a claim for breach of contract would not ordinarily give rise to a claim for restitutionary damages measured by the defendant's gain as opposed to claimant's loss, or to a purely restitutionary claim for either the purchase or sale proceeds, these difficulties are practically circumvented by Indagro claiming damages quantified by reference to its expenditure on financing the purchase of the cargo which became wasted as a result of Viva's breach.

6.65. This conclusion does not, however, answer the question of whether a defence of transaction set-off is available to reduce or extinguish the claim for damages for breach of contract. That issue will be addressed having considered the other causes of action alleged.

Total failure of consideration

6.66. This issue arises as a sub-set of breach of contract with the potential to give rise to a restitutionary claim and hence potentially different implications with regard to the availability of set-off as a defence. Viva points out that a claim of total failure of consideration is at odds with the claim that Indagro acquired good title to the Cargo. I agree with Viva's submission.

Breach of a bailment obligation

6.67. Again, I agree with Viva's contention that no relationship of bailor and bailee arose between Indagro and Viva on the facts of this case. Whilst Viva retained control of the Cargo in the sense of being a seller remaining in possession of the goods after contracting to sell to Indagro, it was not in physical possession as a bailee and nor did the parties contract as bailor and bailee.

Breach of fiduciary duty

6.68. As observed at paragraph 6.10 above, the JVA gave rise to obligations of mutual good faith and as such was capable of giving rise to fiduciary obligations between the co-venturers incidental to their activities. Specifically, Viva was responsible for the Cargo at a point in time when Indagro had funded its acquisition costs and had a contractual entitlement both to sell the Cargo and receive the proceeds as well as its separate contractual right to share in any net profit arising from the sale. These rights do not depend upon the question of whether Indagro had become legal owner of the Cargo.

6.69. In these circumstances, I find that Viva's sale of the Cargo and its retention of the proceeds did amount to a breach of fiduciary duty as well as a breach of contract.

Remedies for breach of fiduciary duty

6.70. Remedies for breach of fiduciary duty include not only a right to claim damages but also to seek the declaration of a constructive trust and to require the restitution of monies diverted in breach of fiduciary duty.

6.71. The salient consideration underlying the availability of these additional remedies is that they depend upon the existence of an underlying proprietary basis to the claim. English law does not presently recognise the existence of a purely remedial constructive trust (see e.g. *Halifax Building Society v. Thomas* [1996] Ch 217). The question of whether Indagro have a claim which has a proprietary base becomes significant in the analysis of whether a defence of transaction set-off is available.

Conversion

6.72. In order to succeed in establishing a separate cause of action in conversion or unlawful interference with goods, Indagro needs to demonstrate that it had a sufficient possessory and/or proprietary interest in the goods at the time that Viva sold or purported to sell them to Titan and Fedcominvest.

6.73. The question of whether and if so, when Indagro acquired title to the Cargo is vexed.

6.74. Viva contends that the Cargo was joint-venture property. They also correctly submit that property is deemed to pass when it is intended to pass. That statement is, however, in and of itself, not

particularly helpful given the number of contra-indications and uncertainties in the evidence, *viz:*

(i) The fact that the actual payment terms were varied from 50% against Viva's invoice and warehouse receipts at [Kavkaz/Kerch] 40% on vessel nomination and the balance on the Bill of Lading weight, to 100% against Viva's invoice when the goods were still at the refinery. This raises a presumption of the passing of property on payment (or at least at the FCA point, following payment).

(ii) The fact that Viva signed Addendum 14 on Indagro's request as late as 9 March 2005 repeating the FOB terms, notwithstanding that both parties knew that the payment had been accelerated beforehand. This tends to negate any variation by conduct of the FOB terms and, in particular, the fairly inflexible presumption that in an FOB contract property does not pass before the goods go over the ship's rail.

(iii) The fact that Viva's invoice (HB 77) was issued and directed payment to Gazexport as its creditor. This strongly indicates that there was no question of Indagro having bought direct from Gazexport, so that Viva appeared to have acquired title at a minimum for a *scintilla temporis* at the FCA point when the goods became ascertained and appropriated to the contract.

(iv) The fact that the Cargo was insured by Indagro from the FCA point. This raises the presumption of property and risk passing together and the need for Indagro to have an insurable interest.

(v) The fact that Gazexport's dispatch declaration references both the sales contracts under which it was selling sulphur, in one case to Viva and in the other to Indagro. It also references addendum no 2 to those contracts, which was not in evidence. This serves further to obscure the situation.

(vi) The fact that Indagro's bankers took a security interest was in evidence, but its precise terms were not in evidence. This would, nonetheless, tend to imply that the bank needed Indagro to acquire title in order to perfect their security.

(vii) The fact that Indagro e-mailed Viva on 7 February 2005, indicating that its bank (unspecified, and Société Générale were not their only bank) would not accept Indagro to pay on FOB basis. This appears to be another counter-indicator of FOB terms being truly intended.

(viii) The fact that Novochimtrans declaration to Société Générale of 2 March 2005 is headed *"Cargo Owner: Indagro SA, Geneva/Viva Chemical Corp., New Jersey"* (HB 80). This tends to support Viva's joint ownership case.

6.75. Weighing all of these factors, I find that on the balance of probabilities, Indagro did acquire title to the Cargo from the FCA point. Even if that were wrong, the accepted position of Viva that it was a joint owner combined with the finding that Viva had no right to sell the Cargo would give Indagro a sufficient proprietary interest to ground an action in tort for Viva's unlawful interference with their joint property. Section 10 of the Tort (Interference with Goods) Act 1977 provides that co-ownership is no defence to an action founded on conversion or trespass to goods where the defendant, without the authority of the other co-owner, disposes of the goods in a way giving good title to the entire property in the goods. It is common ground that (whatever the precise mechanism of Viva's sale of the Cargo to Indagro under the JVA) Viva remained in possession of the Cargo after contracting its sale to Indagro. This engages Section 24 of the Sale of Goods Act 1979, which

provides that a seller remaining in possession of goods after their sale can confer good title on a third party who buys those goods in good faith and without notice of the previous sale. It follows that Viva did give good title to the Cargo to Titan and Fedcominvest as required for the purposes of Section 10 of the 1977 Act. Accordingly, I find that Indagro also has a good claim in Conversion against Viva. As observed at paragraph 6.71 above, it is the proprietary nature of the claim in Conversion that has a potentially determinative effect on the question of whether the defence of set-off is available to Viva.

Fraud and theft

6.76. Viva correctly observes that it is not the crime of theft but the tort inherent in it which gives rise to a civil cause of action. The question of whether the sale of the Cargo should be characterised as theft is, therefore, strictly irrelevant. Nevertheless, I think it is only fair to observe that I do not consider that Indagro came close to showing, even on a civil burden of proof, that the ingredients of a dishonest intention permanently to deprive Indagro of its property were present on Viva's part in this case.

6.77. Similarly, the issue of whether Viva acted fraudulently does not arise in the context of a self-standing fraud based tort, e.g. Deceit. In this case, the question of whether Viva acted fraudulently really comes down to a question of a characterisation of its mental attitude to the actions they took. The impression that I formed is that Viva genuinely blamed Indagro for getting them into an enterprise that was proving disastrous because of a lack of sales over which Viva had no control. Viva resorted to self-help in a way that they may well have felt to be justified but knew (so far as Fedcomvest, in particular, was concerned) would not have been blessed by the del Contes if they had been told in advance. Hence, Viva presented the sales to Indagro as a *fait accompli.*

6.78. Accordingly, I find that no additional causes of action are made out on the basis of Indagro's accusations of fraud and theft.

Is the defence of set-off negated by any of Indagro's three viable causes of action?

6.79. If Indagro's only available cause of action had been for breach of contract, I would have been inclined to find that the defence of set-off was available to Viva.

6.80. In addition to breach of contract, however, I have found that Indagro has two viable parallel causes of action that have a proprietary base.

6.81. One exception to the availability of the defence of set-off entails the principle that a monetary claim can only be set off against another monetary claim and not a claim (even though made as a monetary claim) which is of a proprietary nature. Further passages from *Wood serve* to illustrate this principle and give an example of an authority underpinning it:

"Insulated property claims

A claim may also be insulated from set-off because it is a proprietary claim for the claimant's property held by another. The holder cannot retain the property as security for the cross-claim owing by the claimant unless the holder has a lien or other security interest over the property. A claim may also be treated as proprietary where it is a claim for moneys misappropriated by a fiduciary, such as a trustee or a director, or for the return of a mistaken payment or for the return of money paid for a special purpose which has failed..." p678

6.82. Chapter 9 *of Wood* is devoted entirely to the subject of Money and Property Claims beginning with a summary guide which states:

"(1) Principle

Set-off is generally only available where both claims are money claims, not where one or both is a property claim.

(2) Terminology

A "money claim" in this chapter refers to a debtor-creditor relationship while a "property claim" refers to a proprietary right for the delivery of money or other property..."

6.83. Page 546 of *Wood* cites *Guinness plc v Saunders* [1987] Palmer's Company Cases 413, upheld in the Court of Appeal *sub nom Ward v Guinness plc* [1988] PCC 270, as authority for the proposition that *"even if the property held by the fiduciary has ceased to be identifiable so that the victim is left with a mere money claim. The court may still refuse a set-off on the ground that a set-off by the delinquent would be unjust on grounds of policy."*

6.84. In that case, Ernest Saunders, a director of Guinness plc had received large undisclosed consultancy fees that came to him by virtue of his office. When Guinness sought to reclaim the consultancy fees as an improper secret profit, Saunders sought unsuccessfully to set off other amounts he claimed were owed to him by Guinness. The defence of set-off was dismissed. The subtlety engaged in that case appears to be that the self-help remedy of set-off is not available to a person owing fiduciary duties who has helped himself to the monies or an asset with respect to which those duties are owed.

6.85. On a similar basis, I find that the defence of set-off is not available to Viva in this case.

6.86. In the light of this finding, it is unnecessary for me to consider on an item by item basis whether Viva has proven that the expenditures and liabilities that it had put in evidence are to be credited to it in determining the balances of losses and profits arising under the JVA.

6.87. The fact that Viva has been barred from pursuing its counterclaim in the present proceeding does not, of course, prevent it from raising the counterclaim in a later proceeding. Nor does the fact that the subject-matter of the counterclaim does not provide a defence of set-off mean that the counterclaim is not viable.

6.88. For present purposes, however, I am satisfied that Indagro has made out its case to be awarded damages equal to the amounts claimed (i.e. US$ 678,900.91) by it as expended in connection with the acquisition of the Cargo.

6.89. I am equally satisfied that having prevailed in its claim Indagro is entitled to be reimbursed the amounts of the legal costs and disbursements which it has vouched together with the ICC's fees for the conduct of the arbitration. I make my Award accordingly. Indagro's claim for interest will be allowed from 1 July 2005, being the approximate time by which Indagro should have received the sales proceeds of the Cargo. This was accordingly the time at which Indagro's expenditure to purchase the Cargo became wasted as a result of Viva's breach in taking the sales proceeds. Indagro did not claim a particular percentage rate for interest, but is entitled to interest at a reasonable commercial rate which I am empowered to award under s 49 of the Arbitration Act. I shall accordingly award interest at 1% above US Dollar LIBOR.

7 AWARD

7.1. IT IS HEREBY AWARDED AND DIRECTED THAT:

(a) Viva pay Indagro the sum of US$678,900.91 as damages, plus interest at 1% above the US Dollar overnight LIBOR (London Interbank Offered Rate), as displayed on the British Bankers Association's webpage in respect of the British Bankers' interest settlement rate for US dollars, from 1 July 2005 until payment; and

(b) as to costs:

(i) Viva pay Indagro its legal expenses in the amounts of US$191,610.48, £4,791.84 and €5,440.00 within the meaning of Article 31 of the ICC Rules;

(ii) Viva shall pay Indagro US$ 55,000, such that Respondent shall bear the costs of arbitration, fixed by the Court at US$ 55,000; and

(c) all other claims are dismissed.