ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 18133/CYK

ROCK RESOURCE LIMITED V. ALTOS HORNOS DE MÉXICO, S.A.B. DE C.V.

FINAL AWARD

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22 May 2014

Tribunal:
Louis Benjamin Kimmelman (President)
Manuel García Barragán Martínez (Appointed by the respondent)
Li Lianjun (Appointed by the claimant)

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Final Award

I. INTRODUCTION

A. Summary of Case

1. The dispute in this case is whether the parties entered into a contract for the purchase and sale of goods and, if so, whether such contract was breached.

B. Parties and Counsel

2. **Claimant:** Claimant Rock Resource Limited ("Claimant" or "Rock Resource") is a corporation organized and existing under the laws of Hong Kong, P.R. China, with offices located at:

   Room 709, 7/F Nan Fung Tower
   173 Des Voeux Road
   Central, Hong Kong
   P.R. China

3. Claimant is represented in this case by the following counsel:

   Chu Beiping
   Shi Qiang
   Li Lei
   CHU BEIPING & CO.
   Room 1318-1319, Tower A of Mingshi
   Fortune Center, No. 20 Gangwan Street
   Zongshan District, Dalian 116001
   P.R. China

   - and-

   H. Barry Vasios
   Vincent Foley
   Marisa Marinelli
   HOLLAND & KNIGHT LLP
   31 West 52nd Street
   New York, New York 10019
   U.S.A.

4. **Respondent:** Respondent ALTOS HORNOS DE MEXICO, S.A.B. DE C.V. ("Respondent" or "AHMSA"), is a corporation organized under the laws of Mexico with offices located at:

   Campos Eliseos No. 29, Piso 7
   Colonia Polanco
   11950 Mexico, Distrito Federal
   Mexico

5. Respondent is represented by the following counsel:

   José María Abascal
   Romualdo Segovia
   Paulina Sandoval
   Hector Flores
   Alberto Cepeda
   Andrea de la Brena
   ABASCAL, SEGOVIA & ASOCIADOS, S.C.
   Torre Arcos I, Piso 12 C
   Paseo de Tamarindos No. 90
   Col. Bosques de las Lomas
   CP 05120
   Mexico, Distrito Federal
   Mexico

C. Arbitral Tribunal

6. The members of the Arbitral Tribunal are as follows:

   Mr. Lianjun Li
   REED SMITH RICHARDS BUTLER
   20/F Alexandra House
   18 Chater Road
   Central, Hong Kong
   P.R. China

   Mr. Manuel García Barragán Martínez
   GARCIA BARRAGAN ABOGADOS, S.C.
   Río Guadiana No. 11
   Colonia Cuauhtémoc
   06500 México, Distrito Federal
   México

   Mr. Louis B. Kimmelman
   Chairman of the Arbitral Tribunal

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
U.S.A.

II. PROCEDURAL HISTORY

A. Pleadings and Constitution of Arbitral Tribunal

7. Claimant commenced this arbitration by filing a Request for Arbitration that was received by the International Court of Arbitration of the International Chamber of Commerce ("ICC Court") in Paris, France on August 12, 2011.

8. In the Request for Arbitration, Claimant alleged that there was a contract with Respondent for the sale and purchase of Venezuelan hot briquetted iron ("HBI") and that Respondent breached this contract and thereby caused Claimant to suffer damages.

9. Clause 13 of the alleged contract included an arbitration clause:

> "Any dispute, controversy or claim arising out of or in connection with this contract, or breach, termination or invalidity thereof, shall be settled, if no amicable solution can be found, exclusively by arbitration in accordance with Rules of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration tribunal shall consist of three arbitrators. Each party shall appoint one arbitrator, and the two arbitrators shall appoint the third as presiding arbitrator. If the two arbitrators fail to agree on the third arbitrator, then the presiding arbitrator shall be appointed by the ICC. The proceedings, to be held in the English language, shall be governed by the applicable law in the State of New York. The place of arbitration shall be Manhattan, New York."
>
> [Terms of Reference ¶ 27]

10. In its Request for Arbitration, Claimant nominated Mr. Lianjun Li as a co-arbitrator in this case pursuant to Article 8(4) of the ICC Rules of Arbitration in force as from 1 January 1998 ("ICC Rules").

11. By letter dated September 13, 2011, Respondent requested a 30-day extension of time to submit its Answer to the Request for Arbitration ("Answer"). In that letter, Respondent nominated Mr. Manuel García Barragán Martínez as co-arbitrator pursuant to Article 8(4) of the ICC Rules. Respondent also reserved the right to challenge the existence of the alleged contract "or the existence and validity of the arbitration clause alleged by" Claimant.

12. By letter dated September 21, 2011, the Secretariat of the ICC Court granted Respondent an extension of 30 days to file its Answer (until October 21, 2011). The Secretariat also stated that any jurisdictional objections must be submitted by no later than September 30, 2011.

13. By letter dated September 27, 2011, Respondent denied the existence of the alleged contract on which Claimant relies in this case. Nevertheless, Respondent "accepts... [Claimant's] invitation to submit this dispute to arbitration" under the ICC Rules.

14. By correspondence dated October 6, 2011 and October 9, 2011, the parties indicated that in light of Respondent's agreement to submit this dispute to arbitration, there was no need for the ICC Court to make a prima facie determination of jurisdiction pursuant to Article 6(2) of ICC Rules. However, the parties were unable to agree as to how much time the co-arbitrators should have to try to nominate jointly the chairman.

15. The ICC Court confirmed Mr. Lianjun Li and Mr. Manuel García Barragán Martínez as co-arbitrators in this case on October 20, 2011 pursuant to Article 9(1) of the ICC Rules, and granted the co-arbitrators 30 days to nominate jointly the chairman of the Arbitral Tribunal.

16. Respondent filed its Answer dated October 21, 2011 to the Request for Arbitration. In the Answer, Respondent reiterated that it denied the existence of the alleged contract as well as the arbitration clause contained therein and also reiterated its agreement to resolve this dispute under the ICC Rules.

17. By letter dated November 23, 2011, the Secretariat advised the parties that since the co-arbitrators were unable to nominate jointly the chairman of the Arbitral Tribunal, the ICC Court would appoint the chairman pursuant to Article 8(4) of the ICC Rules.

18. At its session of December 8, 2011, the ICC Court appointed Mr. Louis B. Kimmelman as Chairman of the Arbitral Tribunal pursuant to Article 8(4) of the ICC Rules upon proposal of the United States National Committee of the ICC pursuant to Article 9(3) of the ICC Rules.

19. The Arbitral Tribunal was fully constituted on December 8, 2011 and the file was transmitted to the Arbitral Tribunal that day in accordance with Article 13 of the ICC Rules.

B. Terms of Reference and Provisional Timetable

20. On March 2, 2012, the parties and the Arbitral Tribunal signed the Terms of Reference in this case pursuant to Article 18 of the ICC Rules.

21. Following written submissions from the parties, the Tribunal issued a Provisional Timetable dated April 12, 2012. In the Provisional Timetable, as subsequently amended, the Tribunal provided for various procedural steps to prepare the case for an evidentiary hearing. These steps included initial written submissions as to the parties' claims and defenses in the case, including witness statements, expert reports and documentary evidence, document production and final written submissions together with any additional witness statements, expert reports and supporting documentary evidence. The Provisional Timetable also set the dates for the evidentiary hearing in New York City to the extent such a hearing might be necessary.

C. Procedural Orders

22. On April 11, 2012 Respondent made an application for interim or conservatory measures pursuant to Article 23 of the ICC Rules, seeking an order requiring Claimant to provide security for costs and expenses in this case. On April 18, 2012, Claimant submitted an opposition to the application. The parties made further written submissions by email regarding this application.

23. In an order dated June 19, 2012, the Tribunal denied Respondent's application for interim measures. The Tribunal concluded that Respondent had not established a basis for the Tribunal to issue an order requiring security for costs and expenses in this case.

24. Pursuant to the Provisional Timetable, both parties exchanged requests for document production on July 13, 2012. Each party objected to certain of these document requests, and those disputes were submitted to the Arbitral Tribunal for resolution. By order dated August 4, 2012, the Arbitral Tribunal resolved the disputed document requests.

D. Evidentiary Hearing

25. The parties filed written submissions in support of their respective claims and defenses in this case. In these written submissions, the parties addressed the substantive law to be applied by the Tribunal in resolving this case, the issue of whether there was a contract between the parties and a breach thereof as well as the subject of damages.

26. On May 25, 2012, Claimant submitted its Statement of Claim with supporting documentary evidence. On June 29, 2012, Respondent submitted its Statement of Defense with the supporting witness statement of Carlos Aguayo dated June 29, 2012 and documentary evidence.

27. On September 25, 2012, Claimant submitted its Statement of Reply with supporting witness statement of Ms. Lu Yan dated September 16, 2012, the expert opinion of Luis Monterrubio Alcantara dated September 17, 2012 and documentary evidence. On October 22, 2012, Respondent submitted its Statement of Rejoinder with the expert report of Professor Pilar Perales Viscasillas dated October 21, 2012.

28. In accordance with the Provisional Timetable, on November 2, 2012, both parties advised the Arbitral Tribunal that they believed that an evidentiary hearing in this case was necessary. Claimant requested that Carlos Aguayo be present for cross-examination at the evidentiary hearing. Respondent did not request the presence of any witnesses for cross-examination.

29. On December 2, 2012, the Arbitral Tribunal issued instructions to the parties with respect to the conduct of the evidentiary hearing that would be held on December 7, 2012 in New York City.

30. The evidentiary hearing took place in New York City on December 7, 2012.

31. At the hearing, Claimant cross-examined Respondent's witness, Carlos Aguayo, and Respondent

conducted a redirect examination of Mr. Aguayo. Mr. Aguayo testified with the assistance of an interpreter. In addition, both parties made oral submissions to the Arbitral Tribunal summarizing their respective positions in this case.

32. At the end of the evidentiary hearing, the Arbitral Tribunal advised the parties that it would initially determine what substantive law should be applied to the issues in the case pursuant to Article 17 of the ICC Rules. [Transcript at 242] Claimant argued in its written submissions that the laws of Hong Kong should govern this dispute. Respondent argued that the United Nations Convention on Contracts for the International Sale of Goods ("CISG") was the appropriate law to be applied to this dispute and submitted an expert report on this issue (the expert report of Professor Pilar Perales Viscasillas).

33. On January 27, 2013, the Arbitral Tribunal issued a Procedural Order in which the Tribunal determined that (i) pursuant to Article 17 of the ICC Rules, the CISG is the appropriate law to be applied to the issues in this case; and (ii) the parties shall submit post-hearing memoranda on or before February 18, 2013 (which date was subsequently extended to February 22, 2013) applying the facts of the case to the applicable legal standards in the CISG.

34. The parties submitted post-hearing memoranda on February 22, 2013. The parties also submitted supplemental memoranda on March 7, 2013 and March 14, 2013 with respect a judicial decision that had been cited and relied on by Claimant.

35. In a Procedural Order dated July 15, 2013, the Arbitral Tribunal ordered that each party may submit a response to the other party's post-hearing memorandum within 21 days (which deadline was subsequently extended). In addition, the Tribunal ordered that each party may submit an application for costs within 15 days.

36. On July 30, 2013, the parties submitted their respective cost applications.

37. On August 8, 2013, each party submitted its response to the other party's post-hearing memorandum.

38. By letter dated October 31, 2013, the Chairman of the Tribunal made a disclosure to the parties pursuant to Article 11(3) of the ICC rules. Neither party made any comments or raised any objection to this disclosure.

39. By email dated January 5, 2014, the Tribunal advised the parties pursuant to Article 22(1) of the ICC Rules that the proceedings were closed.

40. The ICC Court extended the time limit for rendering the Final Award in this case several times, the last such extension was granted on March 13, 2014, providing that the Final Award shall be rendered by May 31, 2014.

III. JURISDICTION

41. The Tribunal has jurisdiction to resolve the disputes in this case based on the arbitration clause in the parties' alleged agreement and Respondent's agreement to arbitrate in the Terms of Reference.

42. Claimant relies on the arbitration clause in Article 13 of the alleged Sales Contract dated July 19, 2011 (Contract Number RKH 1101), which states:

"Any dispute, controversy or claim arising out of or in connection with this contract, or breach, termination or invalidity thereof, shall be settled, if no amicable solution can be found, exclusively by arbitration in accordance with Rules of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration tribunal shall consist of three arbitrators. Each party shall appoint one arbitrator, and the two arbitrators shall appoint the third as presiding arbitrator. If the two arbitrators fail to agree on the third arbitrator, then the presiding arbitrator shall be appointed by the ICC. The proceedings, to be held in the English language, shall be governed by the applicable law in the State of New York. The place of arbitration shall be Manhattan, New York.

[Terms of Reference ¶27]

43. Although Respondent disputes whether any contract was entered into by the parties, Respondent did agree to arbitrate in paragraph 28 of the Terms of Reference as follows:

"Respondent agrees that: (i) this dispute shall be finally settled through arbitration conducted under the ICC Rules; (ii) the arbitral tribunal shall consist of three arbitrators; (iii) the place of the Arbitration is New York City, New York, United States of America; and (iv) the language of this arbitration proceeding is English."

[Terms of Reference ¶[28]

44. Therefore, the parties have agreed to arbitrate this dispute under the ICC Rules, and this Tribunal has jurisdiction to resolve the issues in this case.

IV. FACTUAL BACKGROUND

45. Based on the documentary evidence submitted by the parties and the witness testimony, the Tribunal finds the relevant facts to be as set out below.

46. On July 1, 2011, Respondent contacted Hector Morales ("Morales"), a broker, with regard to the purchase of a quantity of HBI. [Exhibit D-01] As indicated below, Morales received and sent all communications between the parties relating to the potential transaction. From the evidence in the case it appears that Morales communicated with Claimant in English and with Respondent in Spanish. [1]

47. On July 2, 2011, Morales responded in an email to Respondent that there was a seller who can:

[1] The exhibits submitted by Respondent reflecting communications with Morales were accompanied by an official English translation.

"offer you 30,000 TM to ship in August at a CFR Altamira/Tampico at a price of US$ 459/TM.[2]

Payment via letter of credit against proof of shipment..."

[Exhibit D-01]

48. After several email exchanges, Respondent responded by email to Morales on July 4, 2011:

"I HEREBY CONFIRM THAT WE ARE READY TO NEGOTIATE DETAILS AND THE ASSIGNMENT OF THE ORDER; THANK YOU FOR YOUR OFFER AND WE SEEK OUT US$455/TON TO CLOSE IMMEDIATELY. WE ARE OPEN TO YOUR COUNTEROFFER. THIS IS THE IDEAL PRICE SOUGHT; I HOPE YOU CAN GET IT.

* * *

WE NEED TO FIND AN OPERATION THAT IS QUICK, AND THAT IS WHY WE ARE ASKING FOR YOUR HELP."

[Exhibit D-01]

49. On July 5, 2011, Morales wrote to Respondent by email as follows:

"I am confirming the order at a price of US$455/TM CFR Tampico or Altamira for 30,000 TM of HBI.

Payment via letter of credit against shipping documents."

[Exhibit D-01] In this email Morales also told Respondent who the seller of the HBI was (Claimant). [Exhibit D-01]

50. On July 5, 2011, Respondent wrote to Morales asking "Did they send you a draft of the contract or how do they wish to carry out the operation?" [Exhibit D-01]

51. On July 7, 2011, Morales informed Respondent by email that "Rock [Claimant] shall provide a contract to confirm this operation." [Exhibit D-02]

52. On July 8, 2011, Respondent sent Morales a draft contract for the purchase of HBI. [Exhibit D-04] The Respondent's draft contract provided for payment by irrevocable letter of credit and stated that the documents under the letter of credit "shall be submitted within 21 days from the Bill of Lading date."[3] [Exhibit D-04]

53. On July 9, 2011, Morales sent Respondent's purchase order to Claimant.

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[2] "TM" refers to metric tons.

[3] The draft also included a provision providing for the expiration of the letter credit however, a proposed date for expiration was not included in this draft.

[Exhibit C-07]

54. On July 11, 2011, Respondent advised Morales by email:

"On your side you have the AHMSA Order generated and the draft of the contract. We will continue to wait for your comments, but we urgently need to conclude this operation since we continue to receive offers and the time factor is quite tight."

[Exhibit D-03]

55. On July 12, 2011, Morales told Claimant to send comments on Respondent's proposed contract or to send its own contract. Morales emphasized:

"AHMSA does not have this order as confirmed until you send confirmation or contract is agreed!"

[Exhibit C-09]

56. On July 12, 2011, Claimant forwarded to Morales a draft contract for "AHMSA's [Respondent's] comments." [Exhibit C-08]

57. Claimant's draft contract provided for the agreed quantity of HBI (30,000 MT), the price (US$455/MT CFR Tampico or Altamira, Mexico) and the specifications of the product. The draft stated that payment was to be made by an irrevocable letter of credit issued by a first class international bank "acceptable to SELLER" and that the terms and conditions of opening the letter of credit "should be acceptable by the SELLER and SELLER'S bank." The letter of credit was to be opened no later than July 17, 2011. In addition, the letter of credit was to have a validity "of 90 days after L/C opening date." The draft contract provided for CIETAC arbitration and the governing law of the contract was Chinese law.

[Exhibit C-08]

58. That same day, July 12, 2011, Morales forwarded this draft contract to Respondent. [Exhibit D-06]

59. On July 13, 2011, Claimant wrote to Morales:

"Please let AHMSA comment the contract draft proposed by us ASAP. For the PO from AHMSA, we confirm it and are willing to deliver the cargo."

[Exhibit C-09]

60. On July 13, 2011, Respondent sent Morales a marked copy of Claimant's draft contract with its proposed changes. The draft included the same quantity and price for the HBI (although the discharge port was now designated as Altamira, Mexico). Payment was to be made by an irrevocable letter of credit "through the Sterling Bank, Houston, Texas" and the terms and

conditions of the letter of credit were to be "reasonably acceptable to SELLER and SELLER'S bank." The draft specified that the letter of credit was to be opened by no later than July 20, 2011 and that it was to have "a term of 45 days from its issuance." The draft provided for ICC arbitration in New York and did not include a governing law provision. [Exhibit D-07]

61. On July 13, 2011, Claimant sent an email to Morales requesting that Respondent confirm a specific vessel and agree that the discharge port would be Altamira, Mexico. [Exhibit C-11] On July 14, 2011, Morales wrote to the Claimant that:

"Vessel is accepted and confirmed for ALTAMIRA."

[Exhibit C-11]

62. Claimant entered into a Charter Party dated July 14, 2011 to load 30,000 MT of HBI in Venezuela for transport to Altamira, Mexico.

[Exhibit C-26]

63. On July 14, 2011, Morales sent Claimant a copy of the draft contract with Respondent's proposed changes marked. [Exhibit C-13] That same day, Claimant responded to Respondent's proposed changes. Claimant's comments included changing the term of validity of the letter of credit (from 45 days to 85 days) and reinserting Chinese law as the governing law of the contract. [Exhibit C-14]

64. On July 15, 2011, Morales sent Claimant a copy of the proposed contract with Respondent's comments. In the email Morales stated:

"We have three points they are not going to concede and we need to accept if not we don't have an order.

1-. The bank emitting the LC is Sterling Bank, confirmed by Commerzbank in Hong Kong, cost of confirmation by Rock.

2. AHMSA cannot accept to have the contract under Chinese law, Mexican or American Law ok.

3. IN case the material is not shipped in 45 days Rock should cancel the LC in order to liberate the funds back to AHMSA.

Please review the whole contract but this three points are most important."

[Exhibit C-15] The draft sent by Respondent with the above email had the same quantity and price of HBI as the prior draft and provided for payment by an irrevocable letter of credit issued by Sterling Bank, Houston, Texas that may be confirmed with Commerzbank of Hong Kong. This draft also stated that the terms and conditions for opening the letter of credit should be "reasonably acceptable to SELLER and SELLER'S bank." Furthermore, the letter of credit was to have "a term of 85 days from its issuance." The draft provided for ICC arbitration in New York, and deleted Chinese law as the governing law. [Exhibit C-15]

65. On July 18, 2011, Morales sent Respondent "the reviewed contract" and application for the letter of credit from Claimant. The contract included the same quantity and price for the HBI and provided for payment by irrevocable letter of credit issued by Sterling Bank, Houston, Texas that may be confirmed with Commerzbank of Hong Kong. The letter of credit was to be opened "with a term of 85 days from its issuance." The draft provided for arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre and selected English law as the governing law. The application for the letter of credit stated that the expiration of the letter of credit was to occur on October 30, 2011 (more than 90 days from issuance) and that the period for presentation of documents under this letter of credit was within 45 days of the bill of lading date. [Exhibit D-12]

66. That same day, July 18, Respondent sent Morales "the last version of the contract revised" but noted that the letter of credit still needed to be reviewed. [Exhibit H(a)]

67. On July 19, 2011, Morales forwarded to Claimant another proposed draft of the contract from Respondent. The email states:

"1- Attached please find the contract final revisions from AHMSA [Respondent], they cannot change this anymore and want Rock [Claimant] to send signed so they can countersign tomorrow.

2- AHMSA will need a letter from Rock confirming the LOI will be made in case documents don't arrive on time. This is also not optional as they don't want demurrages due to lack of BL.

3- LC was accepted and the only revision is regarding the number of days it is to remain open. We need to make this as short as possible to cut the cost of the opening of the LC and also the cost of the confirmation. Commerzbank cost of confirmation of 0.55% per year + EUR 300."

[Exhibit C-17]

68. That same day, July 19, Claimant responded to Morales as follows, attaching a signed contract:

"First, We confirm that LOI will be made in case documents don't arrive on time so that discharge can go on.

Second, please let AHMSA send a LC draft for our view firstly before the LC is established.

Also please make AHMSA issue the LC according to our LC application that had sent to them and put only "Altamira" as the discharge port other than "Tampico or Altamira", other terms please conform to our LC application.

Third, please find attached our contract.

There still some small revision:

a. For the LC term, we tried our best to reduce it, 85 days is the minimum term in order to solve the business.

b. Page 4, 8th paragraph about the discharge port, we add "Altamira", which is agreed by AHMSA.

c. Page 6, LOSS OF CARGO, we revise it since all the things are going to be determined on the loading port.

Appreciate AHMSA's counter signed contract and their LC draft ASAP."

[Exhibit C-18]

69. Also on July 19, Morales forwarded to Respondent a copy of Claimant's July 19, 2011 email (paragraph 68, above) and the signed contract from Claimant. Morales stated: "I think everything is ok and with the contract signed and the draft of the LC today, we should be ok with the order." [Exhibit D-l6] Morales also informed Respondent that Claimant "informed me that they already issued the LC to the suppliers; therefore, the shipment is confirmed." [Exhibit D-16]

70. On July 19, 2011, Respondent sent Morales a draft of the letter of credit that Respondent stated "will be issued tomorrow." The draft provides that it will expire September 20, 2011 (62 days after issuance) and that the period for presentation of documents is 15 days after the Bill of Lading date. [Exhibit D-l8] Respondent stated that "We await your comments and/or approval." [Exhibit D-18]

71. On July 20, 2011, Morales sent Respondent an email attaching proposed amendments to the LC by "our bank." The amendments extended the expiration date of the letter of credit from September 20, 2011 to October 9, 2011 (from 62 to 81 days after issuance) and extended the period for presentation of documents from 15 days to 34 days after the Bill of Lading date. [Exhibit D-15] The email notes that the "main topic after improving the guaranteed deadlines required by the parties was to include 34 days to file the documents after BL date." Morales ended the email as follows:

"This is our best offer, it was already reviewed with Venezuela and with our bank.

I hope that with this we can receive the revised and signed contract and the LC may be opened as soon as possible."

[Exhibit D-15]

72. Later that day, July 20, 2011, Respondent wrote to Morales:

"Since several issues were not resolved and today was the deadline to sign the contract and issue letter of credit it is impossible to continue with this operation."

[Exhibit D-17]

73. In response, on July 21, 2011 Morales wrote to Respondent saying that the "only matter pending are the days to submit the document and they may be reduced to 20 days." [Exhibit D-19]

74. On July 28, 2011, Respondent wrote to Morales:

"Since we could not reach an agreement in terms of the purchase/sale operation of HBI or the letter

of credit on the deadline to carry out the operation, I hereby inform you that purchase order no. 4500887897 has been canceled and rendered null and void."

[Exhibit D-19]

75. This arbitration followed.

V. ISSUES TO BE RESOLVED

76. In the Terms of Reference (paragraph 17), Claimant identified the issues to be determined as follows:

"(a) What is the applicable substantive law?

(b) Whether there is a binding contract between the Parties?

(c) If there is a binding contract, what is the content of the contract, and whether the Respondent breached the contract?

(d) Whether the Respondent is liable for the Claimant's loss and damages? If the answer is affirmative, what is the quantity of damage due to the Claimant?

(e) And such other issues as may be raised by the parties in the course of the proceedings."

[Terms of Reference ¶17]

77. Respondent identified the issues to be determined as "all issues arising from the submissions, statements and pleadings of the Parties which are relevant and necessary for the adjudication of the Parties' respective claims and defenses." [Terms of Reference ¶18]

78. If Claimant established the existence of a contract and a breach by Respondent, then the Tribunal would have to consider the appropriate remedy Claimant seeks damages for breach of the alleged contract plus interest, and Respondent seeks dismissal of the claim plus costs. [Terms of Reference ¶¶ 11, 14-15]

VI. ANALYSIS OF LIABILITY

A. The Applicable Law

79. The fundamental issue in this case is whether the parties entered into a contract. In order to resolve this, the Tribunal had to determine what law governed the question of contract formation. Claimant argued that Hong Kong law applied; Respondent argued that the CISG applied. During the

course of the negotiations between the parties, neither party was willing to accept the other party's choice of a possible governing law for the contract under negotiation. This is apparent from the last draft exchanged between the parties, which does not even include a choice of law provision. [Exhibit C-18]

80. As a result, the Tribunal was required pursuant to Article 17(1) of the ICC Rules to "apply the rules of law which it determines to be appropriate" to the issue of contract formation. It did so by Procedural Order dated January 27, 2013, in which it determined that the CISG is the appropriate law to be applied to this case (see paragraph 33, above). The Tribunal concluded that because this dispute related to an international sale of goods transaction, the appropriate law to be applied was an internationally recognized sales law rather than a domestic sales law. Therefore, the Tribunal chose to apply the CISG.

81. Under the CISG, a "contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention." CISG, Art. 23. An "offer" must be "sufficiently definite" and demonstrate "the intention of the offeror to be bound in case of acceptance." CISG Art. 14. An offer is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Furthermore, an offer is accepted when the offeree makes a "statement" or "other conduct" "indicating assent to an offer." CISG Art. 18. *See Solae, LLC* v. *Hershey Canada Inc.,* 557 F. Supp. 2d 452, 457 (D. Del. 2008). In determining a party's intent, Article 8(3) of the CISG counsels that "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." CISG Art. 8(3).

82. The question presented in this case is whether an offer was made and accepted and therefore whether a contract was concluded.

B. Analysis of Claimant's Arguments

83. Claimant bases its claim that the parties had a binding contract on two arguments:

(a) First, Claimant asserts that a binding contract existed between the parties "as early as July 5 [2011]." [Claimant's Post-Hearing Mem. at 4]

(b) Second, Claimant asserts, alternatively, that a written contract was concluded between the parties on July 19, 2011. [Claimants' Post-Hearing Mem. at 8]

84. Respondent denies that the parties ever reached agreement on the terms of a contract.

85. Claimant argues initially that a contract existed as early as July 5, 2011. [Claimant's Post-Hearing Mem. at 4] In response, Respondent denies that there was any meeting of the minds. [Respondent's Post-Hearing Mem. at 4]

86. The evidence establishes that the parties expected that any agreement that they might conclude

would be reflected in a written contract. On July 5, 2011, Respondent asked Morales, the broker, whether Claimant "sen[t] you a draft of the contract or how do they wish to carry out the operations?" [Exhibit D-01] In response, on July 7, 2011, Morales informed Respondent that "Rock [Claimant] shall provide a contract to confirm this operation." [Exhibit D-02] After July 7, 2011 the parties exchanged several drafts of a contract. On July 15, 2011, Morales wrote to Claimant that "[w]e have three points they are not going to concede and we need to accept if not we don't have an order." [Exhibit C-l5] Thus, it is clear from the parties' communications that they were still negotiating as of July 5, 2011 and did not believe that there was a binding agreement as of that date.

87. Claimant also asserts that Respondent assented to be contractually bound by Respondent's own conduct, such as by issuing a purchase order, confirming the nomination of a vessel and providing the name of a stevedore company. [Claimants' Post-Hearing Mem. at 5] However, this argument ignores the fact that the parties agreed that any transaction would be reflected in a written contract. The negotiation of the terms of such a contract continued well beyond July 5, 2011. Thus, there was no binding agreement as of July 5, 2011.

88. Claimant's second argument is that the parties entered into a binding contract on July 19, 2011, when Respondent received a signed contract from Claimant. [Claimant's Post-hearing Mem. at 6] Again, Respondent denies that there was any meeting of the minds as of July 19. [Respondent's Post-Hearing Mem. at 4]

89. The status of the negotiations between the parties as of July 19, 2011 is reflected in email communications between Morales (the broker) and each of the parties.

90. On July 18, 2011, Morales sent Respondent "the reviewed contract and the application of the LC." Morales asked Respondent to "[p]lease confirm if you agree with the information provided." [Exhibit D-12] The Claimant's draft contract provided for the quantity and price of HBI as had been previously discussed, for payment by irrevocable letter of credit through Sterling Bank, Houston, Texas and for confirmation with Commerzbank of Hong Kong. The letter of credit was to have a term of 85 days from issuance. The draft provided for arbitration in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre and the agreement was to be governed by English law. In addition, the draft "LC Application" provided for expiration of the letter of credit on October 30, 2011 (more than 90 days after the anticipated date of issuance) and for the presentation of documents within 45 days after the bill of lading date. [Exhibit D-12]

91. Later that day, Respondent responded to Morales by email and attached the "last version of the contract revised." The email states that "I require confirmation by Rock that they will deliver a LOI to unload the stuff without delays for lack of BL. Without this confirmation, we cannot proceed." The email also stated that another representative of Respondent (Luis Guillermo Valdes) would "validate" the letter of credit. [Exhibit H(a)] The only changes that were made to the draft contract were in the arbitration clause, which substituted ICC arbitration in New York and deleted the governing law provision. [Exhibit H(a)]

92. Morales forwarded Respondent's draft to Claimant on July 19, 2011 with a covering email. [Exhibit C-17] The email states that the attached is "the contract final revisions from AHMSA [Respondent]" that "they cannot change this anymore and want Rock [Claimant] to send signed so that they can countersign tomorrow." In the attached draft contract is the provision that had appeared in prior

drafts, that the letter of credit shall have "a term of 85 days from its issuance." However, the third point in the covering email states that "LC was accepted and the only revision is regarding the number of days it is to remain open. We need to make this as short as possible with the cost of the opening of the LC...." [Exhibit C-l7] The email says that the only "revision" is regarding the amount of time that the letter of credit would remain open, but the attached draft does not revise or change that time period. Therefore, reading this email together with the attached draft contract, it appears that Respondent was saying that the "term" of the letter of credit should be "revised" to a time period "as short as possible." [Exhibit C-l7] In other words, Respondent was seeking a term for the letter of credit that would be less than the 85 days proposed by Claimant. [Exhibit D-l2]

93. This reading of the email correspondence is consistent with Claimant's own understanding of Respondent's position. When Claimant responded on July 19, 2011 to the July 19, 2011 Morales email (paragraph 92, above), Claimant stated:

"For the LC term we tried our best to reduce it, 85 days is the minimum term in order to solve the business."

[Exhibit D-16] Thus, Claimant understood that Respondent was seeking a shorter term for the letter of credit.

94. Moreover, Claimant asked on July 19 to see a draft of the letter of credit. [Exhibit D-16] Clearly, the terms of the letter of credit were important to Claimant because there were the payment terms for the proposed transaction.

95. Respondent sent a draft letter of credit to Morales on July 19, as requested by Claimant. This draft had an expiration date 62 days from the date of issuance and a period for presentation of documents of 15 days. [Exhibit D-18]

96. On July 20, 2011, Morales forwarded to Respondent amendments to the draft letter of credit by "our bank," which undoubtedly refers to Claimant's bank. The amendment changed the expiration of the letter of credit from 62 days after issuance to 81 days and also changed the time period for presentation of documents to 34 days. [Exhibit D-15]

97. Morales described the status of the negotiations on July 20 as follows.

"This is our best offer... I hope that with this we can receive the revised and signed contract and the LC may be opened as soon as possible."

[Exhibit D-15]

98. It is apparent from the correspondence that although the parties had resolved many terms, they had not reached agreement as of July 19 or 20, 2011 on all of the terms of the contract or the letter of credit and that both of these documents needed to be agreed upon.

99. Claimant argues based on Article 19 of the CISG that there was a binding agreement because Claimant sent a signed contract to Respondent on July 19, thereby accepting Respondent's counter-

offer.

100. Article 19(1) of the CISG states:

"(i) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."

101. Under Article 19(2) of the CISG, if the additional or different terms "do not materially alter the terms of the offer," then the reply constitutes an acceptance unless the offeror promptly objects orally or in writing.

102. Furthermore, Article 19(3) of the CISG states that additional or different terms relating to, among other things, "payment," "are considered to alter the terms of the offer materially."

103. Thus, the issue under Article 19 is whether Claimant sent a reply to an offer on July 19, 2011 that purports to be an acceptance and also whether any additional or different terms included by Claimant "alter the terms of the offer materially." CISG Art. 19(3).

104. Claimant argues based on Exhibit H(a), the draft contract that Respondent sent to Morales on July 18, that Claimant accepted Respondent's offer. [Claimant's Post-Hearing Mem. at 7] However, Morales sent Claimant on July 19 two documents: an email and an attached draft contract [Exhibit C-17]. Although the draft contract in both Exhibit H(a) and Exhibit C-17 is the same, the draft contract sent to Claimant on July 19 was sent with a cover email that reflected Respondent's views on the state of the negotiations. That email makes two statements with respect to the draft contract. First, it states that attached is "the contract final revisions from AHMSA [Respondent], they cannot change this anymore and want Rock [Claimant] to send signed so they can countersign tomorrow." Second, it states that "LC was accepted and the only revision is regarding the number of days it is to remain open. We need to make this as short as possible to cut the cost of the opening of the LC and also the cost of the confirmation." [Exhibit C-17]

105. Reading these provisions in the email together, it appears that Respondent was still attempting to negotiate a change in the number of days that the letter of credit could remain open. This is exactly how Claimant understood this email. In Claimant's response to Morales on July 19, 2011, Claimant recogonized that the term of the letter of credit was still an open issue. In its response, Claimant stated:

"There still some small revision: a. For the LC term, we tried our best to reduce it, 85 days is the minimum time in order to solve the business."

[Exhibit C-18] The email ended with the following statement:

"Appreciate AHMSA's countersigned contract and their LC draft ASAP."

[Exhibit C-18]

106. Although Claimant signed the attached draft contract, it recognized that Respondent still needed to

accept the term of the letter of credit and also provide a draft of the letter of credit. This was not an "acceptance" but rather a counter-offer that Claimant wanted Respondent to accept.

107. From the perspective of CISG Article 19, Claimant's "reply" of July 19 included a signed draft contract together with "additions, limitations or other modifications." The "additions, limitations or other modifications" related to the term of the letter of credit, a provision relating to "payment." By including this provision, Claimant altered the terms of the Respondent's offer materially and made Claimant's reply a counter-offer under Article 19 of the CISG. Respondent did not accept this counter-offer and hence a binding agreement did not result.

108. Respondent's refusal to assent to Claimant's counter-offer is apparent from the draft letter of credit sent by Respondent on July 19, 2011. The draft provided for expiration of the letter of credit within 62 days (not 85 days) and presentation of documents within 15 days of the bill of lading date. [Exhibit D-l8] Both of these terms were rejected by Claimant on July 20, 2011. [Exhibit D-15]

109. Claimant argues that its email of July 19 only contained small revisions confirming non-material changes to the draft contract. [Claimant's Post-Hearing Mem. at 8] However, the term of the letter of credit was a "payment" provision within the meaning of Article 19(3) of the CISG. Thus, Claimant's reply of July 19 constituted a counter-offer rather than an acceptance of Respondent's July 19 email. [Exhibit C-17] Respondent never accepted this counter-offer.

110. Claimant also argues that to the extent there were any differences between the parties in the exchange of drafts on July 19, these differences relate only to the letter of credit application, not the contract, and therefore are not relevant for purposes of determining whether there is a binding contract between the parties. [Claimant's Post-Hearing Mem. at 8, 14] This is incorrect.

111. Claimant cites to *Confeccoes Texteis de Vouzela LDA. V. Riggs National Bank,* 994 F.2d 851, 852 (D.C. Cir. 1993), for the proposition that a letter of credit transaction "deals in documents and is wholly independent of the underlying transaction in goods." This general proposition is correct, where parties have in fact entered into a contract that provides for payment by letter of credit. However, the *Confeccoes* case is irrelevant to the issue here. In this case, we do not have a contract providing for payment by letter of credit. Rather, we have a dispute as to whether the parties ever agreed to a contract providing for payment by letter of credit.

112. The dispute between the parties as to whether there was a contract involves some of the basic elements of the letter of credit because those elements constituted payment terms under the contract. For instance, the duration or term of the letter of credit that was negotiated by the parties was a provision of the draft sales agreement as well as the draft letter of credit. Consequently, any change in this payment term constituted a material alteration of the contract under Article 19(3) of the CISG.

113. Finally, Claimant argues that Claimant's conduct - accepting Respondent's purchase order, nominating a ship and chartering a vessel - somehow bound Respondent. [Claimant's Post-Hearing Mem. at 12] However, all of these "acts" predate the July 19 exchange of proposals and cannot constitute assent by Respondent to any July 19 draft.

114. In conclusion, the parties narrowed their differences in the negotiation process but failed to reach

agreement by July 20, 2011, when Respondent ended the negotiations. As a result, there was no binding contract as of July 19, 2011.

C. The Tribunal's Decision

115. A majority of the Tribunal concludes based on the foregoing analysis of the facts and the relevant provisions of the CISG that there was no meeting of the minds between the parties and therefore no binding contract was created on July 19, 2011 or at any earlier date. Therefore, when Respondent ended the negotiations on July 20, 2011, it did not breach any contract.

116. Accordingly, Claimant's claim for breach of contract must be denied.

117. The dissent states that there was a binding contract on July 19, 2011, largely because "Respondent must have accepted the letter of credit shall be open for 85 days." [Dissent 13] However, the facts are to the contrary. On July 19, Morales forwarded to Claimant a draft contract and a covering email that stated "LC was accepted and the only revision is regarding the number of days it is to remain open." [Exhibit C-17] Claimant understood that Respondent was still questioning the term or duration of the letter of credit because Respondent responded on July 19 that "we tried our best to reduce it, 85 days is the minimum term to solve the business." [Exhibit C-18] In response, on July 19 Respondent sent Morales a draft letter of credit providing that it would expire on September 20, 2011, 62 days — not 85 days - after issuance. And when Claimant responded (through Morales) on July 20 with proposed amendments to the draft letter of credit, Claimant rejected a term of 62 days and proposed 81 days instead.

[Exhibit D-15] Thus, the parties' conduct on and after July 19 confirms that the term or duration of the letter of credit (and other letter of credit terms) had still not been finally agreed.

118. On July 20, 2011, Morales forwarded to Respondent an email with Claimant's proposed amendments to the letter of credit. In that email Morales stated:

"This is our best offer, it was already reviewed with Venezuela and with our bank.

I hope that with this we can receive the revised and signed contract and the LC may be opened as soon as possible."

[Exhibit D-15]

119. This email confirms that as of July 20, 2011, Claimant was still making an "offer" and was still awaiting "the revised and signed contract" from Respondent. The parties simply had not reached agreement on July 19 or at any time before or after that date.

120. In the absence of a contract, a majority of the Tribunal has concluded that the claim must be dismissed. We therefore find it unnecessary to address the various issues raised in the dissent that do not arise in this case and are irrelevant to this award.

VII. COSTS

121. Article 31 of the ICC Rules provides for fixing the costs of the arbitration. Article 31(3) states:

"The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

122. Under Article 31 of the ICC Rules, the costs of the arbitration

"shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court... and the reasonable legal and other costs incurred by the parties for the arbitration."

123. Based on these rules, the Tribunal has discretion to determine how the costs of the arbitration shall be allocated between the parties.

124. Both parties have submitted applications for costs (see paragraph 36, above) in which they seek to recover their respective shares of the arbitrator fees and expenses and ICC administrative costs as well as their reasonable legal and other costs.

125. A majority of the Tribunal separately addresses the two principal components of costs, (i) the ICC arbitration costs comprising the Tribunal's fees and expenses and the ICC administrative expenses and (ii) the parties' legal and other costs.

126. The ICC Court, at its session of April 24, 2014, fixed the ICC arbitration costs in this case at US$ 178,000. With respect to the ICC arbitration costs, each party paid US$ 89,000 as its share of these costs. A majority of the Tribunal concludes that Respondent should recover its share of these ICC costs - US$ 89,000 - from the Claimant.

127. A majority of the Tribunal also concludes that Claimant should bear all of the ICC arbitration costs because Respondent agreed to arbitrate this dispute notwithstanding the fact that it denied that there was any contract between the parties and no agreement to arbitrate. Since Respondent accepted arbitration as proposed by Claimant and prevailed in its position that there was no contract and no arbitration agreement between the parties, it is appropriate that Respondent should not have to bear these costs and that Claimant should have to bear the entirety of the ICC arbitration costs.

128. With respect to the legal and other costs incurred by the parties, a majority of the Tribunal concludes that each party should bear its own legal and other costs.

129. A majority of the Tribunal reaches this conclusion because we believe that there have been genuine differences between the parties as to the merits of this dispute. The Respondent has been the prevailing party based on all the evidence presented; however, the email correspondence between the parties through a broker (Morales) is not without its ambiguities. In light of this, we conclude that there was a good faith dispute between the parties that does not warrant a shifting of the legal and other expenses incurred by each of the parties.

VIII. AWARD

130. For the reasons set forth above, a majority of the Tribunal renders and makes the following Final Award:

(a) Pursuant to Article 17(1) of the ICC Rules, the CISG is the law to be applied to the dispute in this case regarding an alleged sale of goods transaction;

(b) Claimant's claim for breach of contract is hereby dismissed in its entirety;

(c) Claimant is ordered to reimburse Respondent for Respondent's paid-up share of the ICC arbitration costs in the case, totaling US$ 89,000;

(d) The parties shall bear their own respective legal and other costs incurred during the course of the arbitration; and

(e) All other claims in this case are hereby dismissed.