SCC (STOCKHOLM CHAMBER OF COMMERCE)

SCC Case No. 111/2004

RUAL TRADE LTD. B.V.I. V. VIVA TRADE L.L.C.

FINAL AWARD

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10 February 2006

Tribunal:
Bo Nilsson (President)
Stefan Brocker (Appointed by the Appointing Authority)
Jan Ramberg (Appointed by the claimant)

Table of Contents

Table of Contents

Final Award

1. BACKGROUND AND SUMMARY OF THE DISPUTED MATTERS

[1]. Rual Trade Limited B.V.I. (hereinafter referred to as "Rual" or "Claimant") and Viva Trade L.L.C, (hereinafter referred to as "Viva" or "Respondent") are parties to an alumina supply contract dated 19 November 2003 ("Contract"). By the Contract Viva agreed to sell and Rual agreed to purchase "Calcined Metallurgical Grade Alumina" ("Product") produced by Birac Alumina Refinery of Bosnia Herzegovina ("Birac"). The Contract stipulated that Viva shall supply 250,000 metric tons ("MT") +/- 10% of the Product during 2004, with a minimum of 20,800 MT +/- 10% to be supplied each month in the period January through December 2004. The price was fixed at USD 263 per MT (FOB Ploce, Croatia) alternatively at USD 242 per MT (FCA Birac). The Contract is governed by CISG supplemented by Swedish law.

[2]. Subsequently Viva and Rual (collectively referred to as the "Parties") entered into a supplemental agreement dated 22 January 2004 (the "Supplemental Agreement") whereby the Parties agreed to increase the price indicated in the Contract by USD 23 for each delivered MT of the Product.

[3]. The Parties further concluded a Memorandum of Understanding ("MoU") likewise dated 22 January 2004 whereby Rual and Viva agreed to invest in the Birac facility a total of USD 7,000,000 of which the *"first tranch of... USD 3.5 min will be paid by RUAL to VIVA or its nominee by bank transfer within 10 banking days after presentation of VIVA's invoice.."* (the "Investment") and the *"second tranch of... USD 3.5 min will be provided by RUAL to VIVA in the form of an interest free loan extended for one calendar year. This loan will be paid back in Birac alumina during 2005 at a schedule to be mutually agreed between RUAL and VIVA."* (the "Loan"). Rual subsequently transferred the amounts of both the Investment and the Loan to Viva.

[4]. During the period January - October 2004 Viva delivered to Rual FOB Ploce a total of 153,765 MT of the Product. Following correspondence between the parties during November 2004 Rual avoided the Contract on 6 December 2004 and principally seeks in this arbitration (i) compensation for viva's alleged failure to deliver 71,235 MT of the Product (250,000 MT - 10% * 250,000 MT - 153,755 MT) and (ii) repayment of the Investment.

[5]. Viva denies Rual's claims and for its part principally claims payment of USD 775,928 being the amount allegedly due and unpaid under the Supplemental Agreement for the Product delivered during the months of September and October 2004.

2. THE ARBITRATION CLAUSE AND THE ARBITRAL PROCEEDINGS

[6]. With reference to article 17 in the Contract the Claimant filed a request ("Request") for Arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce (the "Institute") on 10

December 2004, requesting an Arbitral Tribunal to be constituted to determine the disputes with Viva. The Request named Prof. Ramberg as arbitrator.

[7]. The arbitration clause (article 17) reads as follows:
"The parties shall try to resolve all disputes and arguments in connection with this agreement by the way of mutual negotiation.

Any dispute, controversy or claim arising out of or in connection with the present contract, including the execution, performance, breach, termination or invalidity thereof, shall be finally settled by the arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of 3 (three) arbitrators - one shall be appointed by the plaintiff, one shall be appointed by the defendant and one - chairman of the arbitral tribunal shall be appointed by the Arbitration Institute of the Stockholm Chamber of Commerce. The place of the proceedings shall be Stockholm, Sweden. The language to be used in the arbitral proceeding shall be English and Russian. The parties irrevocable represent and agree that arbitration award is final and is enforceable against them and their assets."

[8]. By the Request Rual claimed in summary that Viva should pay damages with interest due to non-fulfilment of the Contract. Rual also requested that Viva be ordered to reimburse. Rual for its costs of the arbitration and for Rual's legal representation.

[9]. In a letter dated 20 December 2004 the Institute requested that Viva respond to the Request by 3 January 2005. As Viva did not respond the Institute, on 3 February 2005, decided that Mr. Brocker should be appointed arbitrator on behalf of Viva and that Mr. Nilsson should be appointed chairman. On the same day the Institute also set the advance on costs to EUR 216,000, to be paid by the Parties by half each.

[10]. On 8 March 2005 the Institute informed the Parties that Rual had paid its part of the advance on costs and requested Viva to pay its part.

[11]. On 17 March 2005 Rual amended its Request. By the amendment Rual named Mr. Vladimir Romanov and Mr. Roman Romanov ("Romanovs") as additional Respondents, claiming that they were personally accountable to Rual.

[12]. The Institute, with its letter of 21 March 2005, sent the Amended Request for Arbitration to Viva, requesting comments not later than 4 April 2005.

[13]. Viva, through Mr. Svahnström, by letter of 1 April 2005 to the Institute objected to participation by the Romanovs in the arbitration.

[14]. The Romanovs through the law firm Berwin Leighton Paisner by letter of 1 April 2005 contested jurisdiction by the Institute over the Romanovs, explaining that the Romanovs had been furnished copy of the Institute's letter of 21 March 2005 by Viva's counsel.

[15]. The Institute, in a letter dated 6 April 2005, declared that "..... *we would hereby like to clarify that Mr Vladimir Romanov and Mr Roman Romanov are not currently parties to any arbitration at the*

/Institute/..".

[16]. Following further correspondence, the Institute by letter 14 April 2005, informed the Parties that the Claimant had provided the entire advance on costs of EUR 216,000 and referred the case to the arbitrators, reminding them that the award should be rendered not later than 14 October 2005.

[17]. Noting that no dispute involving other parties than Rual and Viva had been referred to them, the arbitrators considered themselves duly appointed to determine the dispute between the Parties and on 26 April 2005 ordered as follows:
2.1 The place of arbitration shall be Stockholm, Sweden.

2.2 Both parties have retained counsel fluent in the English language. While the languages of the arbitration are English and Russian, the parties are recommended to continue to file their communications in English which will also be the language used at all oral hearings in the case unless otherwise decided. If either party wishes to make written or oral submissions in Russian, the Tribunal will arrange for transla tion/interpretation and treat the costs therefore as costs of the arbitration. The parties are similarly recommended to file translations into English, which need not be certified unless objected to by the other party, with copies of any relevant documents filed which are originally in Russian.

2.3 All communications filed should be sent either by messenger, or by (fax or) e mail with confirmation copy by post, simultaneously to each counsel designated by the other side and to each arbitrator.

2.4 The following schedule is set for the proceedings. Amendments thereto may be considered at the request of a party for good reasons shown, but times have been set so that it should in the Tribunal's view be possible for the parties to adhere to the schedule.

2.4.1 Claimant shall file not later than 25 May 2005 a Statement of Claim, in accordance with Article 21 of the Rules of the Institute.

2.4.2 Respondent shall file not later than 23 June 2005 a Statement of Defence in accordance with said Article.

2.4.3 Claimant shall file not later than 15 August 2005 a Reply and Final Statement of Evidence, enclosing any written evidence not previously submitted and specifying what Claimant wishes to prove by each item of written and/or oral evidence invoked and indicating whether any witness invoked needs the assistance of an interpreter.

2.4.4 Respondent shall file not later than 15 September 2005 a Rejoinder and Final Statement of Evidence, enclosing any written evidence not previously submitted and specifying what Respondent wishes to prove by each item of written and/or oral evidence invoked and indicating whether any witness invoked needs the assistance of an interpreter.

2.4.5 Further exchanges of briefs may take place if and as directed by the arbitrators who may also order a pre-trial conference if deemed necessary. No documents will be accepted after 10 October 2005 unless the Tribunal for special reasons so allows.

2.4.6 An oral hearing of the case is provisionally fixed to take place in the offices of RydinCarlsten Advokatbyrå AB at Norrmaimstorg 14 in Stockholm on 24 October 2005, commencing at 0930 a.m. and continuing if and as necessary on 25-27 October 2004. If neither party has latest 11 May 2005 for good reason requested an alternative time to be fixed for the oral hearing, the hearing time provisionally fixed shall be definite.

2.5 If a party fails to comply with the above orders for filing documents or fails to appear at the oral hearing this will not prevent the Tribunal from proceeding with and deciding the case.

[18]. Claimant filed, on 25 May 2005, a Statement of Claim against Respondent, whereby Claimant adjusted the relief sought to also encompass repayment of the Investment.

[19]. Following a grant of extension, Respondent filed on 30 June 2005, a Statement of Defence and Counterclaim. By the Statement of Defence Respondent opposed Rual's claim for damages and further alleged that the Tribunal does not have jurisdiction over disputes under the MoU. In the counterclaim Viva claimed compensation for non-payment as aforesaid.

[20]. Following a grant of extension, Claimant filed on 22 August 2005 a Reply which also contained a Statement of Evidence. By the Reply Claimants requested that the Arbitral Tribunal dismiss the Respondent's counterclaim or, alternatively, that the Arbitral Tribunal/Institute fix a separate amount on advance on costs in respect of the counterclaim.

[21]. By a decision of 24 August 2005 the Arbitral Tribunal denied the Respondent's request to dismiss the counterclaim, but found it reasonable to request that the Institute consider whether to fix a separate amount for the counterclaim. On the same day the Arbitral Tribunal informed the Institute about its decision and request.

[22]. On 20 September 2005 the Arbitral Tribunal requested an extension of time until 31 December 2005 for rendering the award.

[23]. With reference to Claimant's Amended Request, Respondent's counterclaim and the Arbitral Tribunal's request of 24 August 2005, the Institute on 28 September 2005 fixed a new advance on costs. Rual was thus ordered to pay an additional EUR 22,760 and Viva was ordered to pay EUR 15,240.

[24]. By fax 29 September 2005 the Institute informed the Parties and the Arbitral Tribunal that it had extended the time for rendering the award until 2 January 2005.

[25]. On 29 September 2005 the Arbitral Tribunal decided that;
1. Viva is granted until 11 October 2005 to file its Rejoinder and Statement of Evidence. After this time Viva will not be permitted to invoke any further circumstances or evidence unless Viva demonstrates good reason why they could not have been presented earlier.

2. As per the Tribunal's previous decision Rual has until 1 7 October 2005 to supple ment the circumstances and evidence invoked by Rual. This deadline shall still apply except insofar as Viva's

Rejoinder and Statement of Evidence may cause Rual to invoke circumstances or evidence in rebuttal for which Rual shall have until 29 October 2005. After the deadlines thus set Rual may invoke further circumstances or evidence only if Rual demonstrates good reason why they could not be presented earlier.

3. The Tribunal still expects counsel to cooperate on a proposed schedule for the hearing currently scheduled to take place on 24-27 October. Given the above extensions of time counsel should communicate such schedule to the Tribunal latest on 17 October 2005. The Tribunal notes that it may not be necessary to use all reserved days.

[26]. On 11 October 2005 the Respondent filed its Rejoinder and Statement of Defence.

[27]. By fax 13 October 2005 the Institute proclaimed that the additional advance costs had been paid by the parties.

[28]. On 14 October 2005 the Claimant filed its Supplemental Statement of Evidence.

[29]. By fax 15 October 2005 the Respondent requested that the new evidence invoked by the Claimant on 14 October 2005 be dismissed, alternatively that the hearing regarding the main claim and Viva's counterclaim be deterred until a later date and Monday 24 October 2005 be used for pleadings on the jurisdiction issue. The Claimant responded to Respondent's request on 17 October 2005 and argued that the new evidence should not be dismissed, nor that the hearing should be suspended.

[30]. On 18 October 2005 the Arbitral Tribunal cancelled the hearing scheduled for 24-26 October 2005 in its entirety on the grounds, *inter alia,* that Respondent's view that the time available to rebut the new evidence invoked by Claimant was too short was not unreasonable and that Claimant had insisted on personal appearance by Respondent's witness Ms. Egle Vadopaliene who, because of a recent childbirth according to Respondent was unable to so appear at the scheduled hearing.

[31]. By the chairman's e-mail of 26 October 2003 the Tribunal addressed the parties as follows:
Viva has in its latest submission indicated a desire to respond to the evidence last introduced by Rual. Furthermore, counsel to Rual has aver the telephone expressed Rual's desire to respond more fully to Viva's rejoinder than time previously permitted. In view of the fact that the final hearing will not take place until next year, the parties are granted time until 2 December 2005 for such submissions. This time limit will not be extended and no further submissions will be allowed unless special circumstances so warrant.

[32]. On 28 November 2005 Viva submitted a request for permission to apply with the District Court of Stockholm for an order that Rual should produce certain documents.

[33]. On 2 December 2005 Viva filed a Supplemental Statement of Evidence. On the same day Rual submitted a brief as a response to Viva's Rejoinder submitted 11 October 2005, enclosing a legal opinion on Wisconsin law in support of Rual's contention that Mr. Vladimir Romanov has bound Viva by certain actions.

[34]. On 5 December 2005 the Tribunal requested an extension from the Institute until 15 March 2006 to render the award.

[35]. On 9 December 2005 Rual submitted a reply to Viva's request for permission to apply for production of documents.

[36]. On 12 December 2005 Viva submitted remarks and comments is relation to recent submissions and pending issues. Rual replied to this submission on 13 December 2005.

[37]. In a decision on 13 December 2005 the Arbitral Tribunal denied Viva's request for permission to apply for production of documents with the Stockholm District Court.

[38]. On 15 December 2005 the Institute informed the parties and the Arbitral Tribunal that the time for rendering the award had been extended until 15 March 2006.

[39]. Thereafter, both Parties invoked evidence not previously specified, latest Viva by message of 22 December 2005 attaching a written statement by Mr. Roman Romanov. The Tribunal decided to accept the evidence thus invoked by both Parties, the statement by Mr. Roman Romanov, however, only on the condition that he appear for cross-examination before the Arbitral Tribunal at the final hearing.

[40]. The final hearing was held in Stockholm 12-14 January 2006. The Tribunal had before the hearing communicated its decision to hear on this occasion Claimant's claim for USD 3,500,000 only as regards the jurisdictional issue. At the hearing testified, on Claimant's request, Mr. Sergey Tikhomirov, Mr. Andrey Raykov, Mr. Greg Harris, Mr. Roman Khaev and Mr. Andrew Geddes (expert) and, on Respondent's request, Mr. Roman Romanov, Ms. Egle Vadopaliene, Mr. Rolandas Balcikonis and Mr. Brian Sawyer (expert).

[41]. After the hearing Viva submitted additional written evidence by e-mail of 23 January 2006. Rual objected to the admissibility of that communication by fax 24 January 2006 to which Viva replied by e-mail the following day. With reference to Article 23 of the Swedish Arbitration Act and Article 22 of the Rules of the Institute the Tribunal refuses to admit the new evidence.

3. RELIEF REQUESTED

3.1 Claimant's requests for relief

[42]. 3.1.1 Claimant requests that the Arbitral Tribunal order Respondent to immediately pay USD 11,544,275 to Claimant.

[43]. 3.1.2 In addition, Claimant requests the Arbitral Tribunal to order the Respondent to pay interest at an annual rate determined pursuant to sections 4 and 6 of the Swedish Interest Act (1975:635) on the amount USD 8,044,275 from the date when the Respondent received the Request (which the parties agree should be deemed to be 1 January 2005) until payment has been made and on the

amount USD 3,500,000 from the date when the Respondent received the Statement of Claim (which the parties agree should be deemed to be 26 May 2005) until payment has been made

[44]. 3.1.3 Claimant also requests the Arbitral Tribunal to order Respondent to pay Claimant's fees and cost of the arbitration, including but not limited to attorneys fees, fees of any technical consultants or similar and amongst the parties the fees of the Arbitral Tribunal and the Arbitration Institute of the Stockholm Chamber of Commerce, plus interest from the date of the award at an annual rate determined pursuant to paragraph 6 of the Swedish Interest Act.

3.2 Respondent's position as regards relief sought by Claimant

[45]. The Respondent requests the Arbitral Tribunal to
i) disallow the Claimant's claim for USD 8,044,275 for loss and damages,

ii) dismiss Claimant's claim for USD 3,500,000 for lack of jurisdiction, or in any event disallow the claim.

[46]. The Respondent admits the fairness per se of an amount of USD 3,218,565

3.3 Respondent's counterclaim and cost claim

[47]. 3.3.1 Respondent requests the Arbitral Tribunal to order Claimant immediately to pay USD 775,928.44 to Respondent.

[48]. 3.3.2 In addition Respondent requests the Arbitral Tribunal to order Claimant to pay interest (pursuant to Article 78 CISG) at an annual rate determined pursuant to section 6 of the Swedish Interest Act (1975:635) on the amount of USD 775,923.44 from (3 days after the date of the invoice i.e.) 4 November 2004 until payment has been made.

[49]. 3.3.3 Respondent also requests the Arbitral Tribunal to order Claimant to pay Respondent's costs of the Arbitration, comprising the Respondent's costs incidental to both the Statement of Claim and the counterclaim, including (but not limited to) attorney's fees, the fees of the Arbitral Tribunal and the Institute, plus interest on such amount from the dare of the award at an annual rate determined pursuant to section 8 chapter 18 of the Swedish Procedural Code, at an at an annual rate determined pursuant to section 6 of the Swedish Interest Act (1975:835).

3.4 Claimant's position as regards relief sought by Respondent

[50]. The Claimant requests the Arbitral Tribunal to
i) disallow Respondent's claim, together with the claim for interest and the claim for the Respondent's costs of the Arbitration; or in any event decide that

ii) the alleged claim should be set off against Claimant's claim against Respondent.

4. GROUNDS

4.1 Rual's claim

[51]. 4.1.1 Respondent has failed to perform its obligations under the Contract thereby causing Claimant damages, losses and costs according to 3.1.1 above. Claimant has, based on the circumstances further developed below, rightfully declared the Contract avoided.

[52]. 4.1.1.1 Respondent is bound by the avoidance of the Contract due to its passivity. The Claimant, as the Respondent remained silent, had good grounds to conclude that Viva had accepted the avoidance of the Contract. The Respondent must obviously have understood that the Claimant had such good grounds, due to the deviation from normal behaviour of parties in international commercial transactions, the Respondent's deviations from the obligation to act loyally towards the other party to the Contract and the extensive period of time before the Respondent contested the avoidance.

[53]. 4.1.1.2 Respondent has been in fundamental breach of contract, by:
i) wrongfully stating that Respondent "suspended" the performance of the Contract;

ii) stating that the Respondent had no intention to fulfil its obligations with respect to the Contract;

iii) wrongfully rejecting several nominations of vessels;

iv) not delivering any alumina during November 2004;

v) not even in the beginning of December 2004, accepting to fix a date for delivery of the November and December instalments;

vi) being in delay regarding outstanding non-delivered quantities of the January-October 2004 instalments;

vii) being in delay regarding a substantial part of the total obligations in respect of the Contract.

[54]. 4.1.1.3 Rual set an additional period of time for Viva to perform the Contract. Viva declared that Viva would not deliver within the period so fixed, thereby creating the right for Rual to declare the Contract avoided.

[55]. 4.1.1.4 Viva was misleading Rual, Viva further misrepresented and acted in breach of Viva's duty of loyalty in relation to Rual.

[56]. 4.1.1.5 By the right to avoid the Contract Rual was entitled to claim compensation for the

outstanding delivery of 71,235 MT of alumina. Rual has completed a cover purchase, according to art 75 CISG, of 17,616 MT at a price of USD 350 per MT. The price difference was thus 350-286 USD per MT giving a total difference amounting to USD 1,127,424. The remaining outstanding delivery, 71,235 - 17,616 = 53,619 MT, shall, according to article 76 CISG, be compensated in accordance with the spot market price for alumina in December 2004 less the Contract price per MT. As the spot market price amounted to USD 415 per MT the compensation, with respect to the remaining outstanding delivery, amounts to (415 - 286) * 53,619 = USD 6,916,851. Thus, the total compensation for the outstanding delivery of 71,235 MT alumina amounts to 1,127,424 + 6,916,851 = USD 8,044,275.

[57]. 4.1.1.6 The Investment under the MoU was conditioned upon the performance of the Contract. Thus, the MoU is part of the contractual relationship between Viva and Rual and in any event, the MoU is so closely connected to the Contract that the arbitration clause in the Contract also gives jurisdiction for the Arbitral Tribunal over disputes arising out of the MoU, which was a part of the transactions carried out in pursuance of the Contract. Accordingly, Rual has the right to claim repayment of the Investment due to the avoidance of the Contract; to the fundamental breaches of contract; and to the fact that Viva did not use the funds for the purpose agreed upon.

[58]. 4.1.1.7 The total amount claimed with respect to the outstanding delivery and the Investment is thus 8,044,275 + 3,500,000 = USD 11,544,275.

4.1.2 Viva's denial

[59]. 4.1.2.1 Viva denies that it has failed to perform its obligations under the Contract and caused Rual damages, losses and costs. Viva also denies that Rual has rightfully declared the Contract avoided.

[60]. 4.1.2.1.1 Viva denies that Viva is bound by the avoidance of contract due to its passivity. Viva's passivity does not create any rights for Rual. Viva's failure to express its view does not create an express disadvantage for Rual.

[61]. 4.1.2.1.2 Viva has not been in fundamental breach of the contract:
i) Viva was entitled to suspend the performance of the Contract because of Rual's failure to pay;

ii) Viva denies that Mr. Vladimir Romanov has stated that Viva will not fulfil the Contract and, even if that were the case, Mr. Vladimir Romanov could not bind Viva and Rual has, in any case, acted to late on that information;

iii) With respect to nomination of vessels, Viva has acted in accordance with the parties' established conduct under the Contract;

iv) With respect to delivery of alumina during November, Viva had clearly indicated that Viva would deliver the November instalment in December 2004/January 2005;

v) With reference to accepting to fix a date for delivery of the November and December instalments in the beginning of December. Viva had rightfully suspended its performance;

vi) With respect to delay regarding outstanding non-delivered quantities of the January - October

instalments, Rual has accepted each individual instalment or at least not timely raised objections with respect to each individual instalment;

vii) With respect to delay regarding a substantial part of the total obligations, each instalment has to been look upon separately and Rual has accepted each instalment.

[62]. 4.1.2.1.3 Rual did not adequately set an additional period of time for Viva to perform the Contract and even, if that were the case Viva was not obliged to unconditionally accept Rual's nomination of vessels.

[63]. 4.1.2.1.4 Viva did not mislead Rual or act in breach of Viva's duty of loyalty in relation to Rual.

[64]. 4.1.2.1.5 Viva denies that the spot market price in December 2004 was USD 415 per MT. According to Viva it was USD 325 per MT. Viva accepts, however, that Rual has performed the alleged substitute transaction at 350 MT wherefore the damages - if such were due - could be calculated at (325-286)*53,619 + 1,127,424 = USD 3,218,565.

[65]. 4.1.2.1.6 Viva disputes that the Arbitral Tribunal has jurisdiction over the MoU and consequently Viva asserts that the Arbitral Tribunal shall not try Rual's claim over the Investment.

4.2 Viva's counterclaim

[66]. 4.2.1 On 31 October 2004 Viva issued invoice No 09 (incorrectly dated 31 August 2004) for the amount of USD 775,928.44. The invoice was for 33,707,623 MT of alumina delivered to Rual during September and October 2004 and the sum claimed included the additional price of USD 23 per MT according to the Supplemental Agreement. Rual has failed to pay this sum despite being requested by Viva to do so.

4.2.2 Rual's response to Viva's counterclaim

[67]. 4.2.2.1 Rual asserts that the invoiceNo 09 is not due for payment as it was incorrectly dated and not in compliance with the payment instructions contained in the Supplemental Agreement.

[68]. 4.2.2.2 If the Arbitral Tribunal would find that Rual is obliged to pay invoiceNo 09, Rual requests that the Arbitral Tribunal set off Viva's counterclaim against Rual's claim.

5. RUAL'S DEVELOPMENT OF ITS CASE

5.1 Mr. Vladimir Romanov's authority to bind Viva

[69]. Rual contends that Mr. Vladimir Romanov has the authority to bind Viva.

[70]. Mr. Vladimir Romanov is a shareholder of the Lithuanian bank Ukio Bankas, as well as the Lithuanian company Kauno Tiekimas and AB Ukio Bankas Investicine Group (UBIG). UBIG is the major shareholder of Birac. As shareholder and board member of UBIG Mr. Vladimir Romanov has the ultimate control of the delivery of alumina from Birac.

[71]. The Contract was negotiated by Mr. Vladimir Romanov. Mr. Vladimir Romanov did not first disclose who the seller would be. It was first after lengthy negotiations that Mr. Vladimir Romanov told Rual that the seller would be Viva, a company incorporated under the laws of the State of Wisconsin, USA. However, the Contract was operated by a person working for Kauno Tiekimas. This person's e-mail contains the name UBIG. This shows how closely associated the companies controlled by Mr. Vladimir Romanov are.

[72]. The Contract, Supplemental Agreement and the MoU were all negotiated by Mr. Vladimir Romanov Mr. Vladimir Romanov took all commercial decisions and other decisions in relation to the Contract and the MoU.

[73]. The Contract was signed by Mr. Vladimir Romanov's son Mr. Roman Romanov. The nominal director of Viva, Mr. Eduard Mitelman, never participated in the negotiations, nor in the execution of the Contract. It was first in November 2004 that Viva communicated with Rual and, *inter alia,* informed Rual that "*V. Romanov neither in fact, nor in law represents Viva Trade LLC and moreover doer not have any power to give legally binding statements or, behalf of Viva Trade".*

[74]. The question of Mr. Vladimir Romanov's authority to bind Viva shall be determined according to the law of the *situs* of Viva, i.e. State of Wisconsin, USA.

[75]. As Rual has not been able to obtain documents showing that Mr. Vladimir Romanov is the shareholder and formally authorized to represent Viva, Rual relies on the doctrine of implied or apparent authority under the laws of State of Wisconsin. To be liable for apparent authority three elements must be present:
i) Acts by the agent or principal justifying belief in the agency;

ii) Knowledge thereof by the party sought to be bound as principal;

iii) Reliance thereon by the plaintiff, consistent with ordinary care and prudence.

[76]. The said three criteria are satisfied with respect to Mr. Vladimir Romanov.

5.2 Breaches of Contract

5.2.1 The provisions of the Contract and the Supplemental Agreement

[77]. The Contract provides, inter alia:
Article 1 Definitions:

1.1 In this agreement, unless the context otherwise requires or the contrary intention appears:

(a) "Contract" means this present alumina purchase and supply contract;

(c) "FOB" means "Free on Board" as defined by INCOTERMS 2000 (ICC, Paris, Publication No. 560), as amended by time to time;

(d) "ST" means "stowed" in the case of bagged alumina being loaded FOB vessel or in the case of loading on board ocean vessel in bulk, "ST" means "spout trimmed", which refers to manner of loading in accordance with the instructions of the master of the vessel to ensure the safety and stability of the vessel;

(e) "Lay can" means lay days and cancelling period during which the SELLER declares to the BUYER that the BUYER'S nominated vessel required is ready in all respects to load the cargo of alumina at the port of loading declared by the SELLER;

(f) "Load port" means the port from where the alumina shall be loaded by SELLER into BUYER'S vessel;

Article 2 Term:

This contract is to be executed during 2004 (January through December) to commence on the day it is duly signed by both BUYER and SELLER and shall remain in force until the obligations set forth have been fully executed by both parties, unless as otherwise resolved by mutual consent of both parties in writing.

In case of proper execution of this contract within 2004, the contract can be renewed for 2005, by mutual agreement of both parties in writing.

Article 3 Origin:

Alumina is produced by the Birac Alumina Refinery, Republic of Srpska, Bosnia-Herzegovina.

Article 5 Quantity:

250,000 (two hundred and fifty thousand) metric tons +/- 10 % shipping tolerance in SELLER'S option.

5.1 Increased Quantity Option:

In the event the SELLER is able to supply additional quantity - up to 50,000 (fifty thousand) MT during 2004, SELLER shall notify, BUYER of his intent to ship additional quantity at least 30 days prior to the first day of the scheduled shipment month. BUYER is obliged to buy this additional quantity within 2004.

The price, terms and conditions of which shall be exactly the same as per this contract.

Article 7 Delivery Terms:

In SELLER'S Option as follow:

7.1 In bulk: FOB ST (spout trimmed) ocean-going vessel, Port of Place, Croatia:

7.2 In bulk FCA Birac, loaded in BUYER'S vehicles (refer to Article 10.1) below;

7.3 In case of delivery FCA Birac, the SELLER shall notify BUYER of his intent to deliver latest 30 days prior to the estimated date of delivery.

7. 4 Delivery point(s) if other than above, to be mutually agreed between BUYER and SELLER on a case-by-case basis.

Article 3 Load Terms:

For ocean shipment, relating to article 7.1 above, Seller agrees load rate of minimum 1,000 (one thousand) tons per weather working day (WWD) Saturday Sunday Holliday Excepted (SSHEX) unless used (W) at load port of Place, Croatia.

Article 9 Shipment:

Minimum of 20,800 (twenty thousand and eight hundred) MT per month (+/- 10 % shipping tolerance in SELLER'S option) January through December 2004. Exact shipping schedule for 2004 to be mutually agreed between BUYER and SELLER in writing not later than December, 2003.

Article 10 Price:

US Dollars 263.00 per metric ton (two hundred and sixty three) FOB ST ocean vessel, Port of Place, Croatia, or as follows:

10.1 If SELLER prefers to sell on FCA Birac basis, the price shall be USD 242.00 (two hundred and forty two) per MT, loaded to BUYER'S vehicles;

10.2 If other than above delivery point, price to be mutually agreed between BUYER and SELLER on a case by case basis.

Article 11 (first para)

11.1 No less than ten (10) working days prior to the scheduled month of shipment. Seller will deliver to Buyer a proforma, invoice for estimated monthly quantity of alumina scheduled for loading. Payment of 70% of the amount stipulated on the invoice will be effected by Buyer five (5) working days prior to the scheduled month of shipment by telegraphic transfer in US Dollars to the Seller's nominated account.

...

Article 18 Law:

This contract shall be governed by and construed in accordance with the Vienna Convention for International Sales of Goods of 1980. Issues not considered by this convention shall be settled in accordance with the substantive law of Sweden.

Article 19 INCOTERMS:

Unless otherwise specified herein, Incoterms 2000 will be applicable for the execution of the present contract.

[78]. By the Supplemental Agreement the Parties agreed to increase the price per MT in the Contract by 23 USD.

5.2.2 Events leading up to the breaches of the Contract

[79]. Already during the first month of the performance of the Contract, Viva failed to comply with its terms in respect of the agreed monthly quantities. The short deliveries continued throughout the spring and the summer 2004 except for the deliveries in February and March 2004.

[80]. Rual sent an e-mail on 10 April 2004 requesting that Viva answer how Viva intended to cover the shortfall for January. Viva responded to the e-mail by stating that Viva would compensate Rual for the shortfall until the end of 2004.

[81]. On 17 may 2004 Rual sent another complaint by which Rual again notified Viva about the shortfall. Rual also sent a letter on 23 June 2004 in which Rual called for Viva's attention to the short deliveries.

[82]. The issue of shortages was again discussed between the parties in June/July 2004 in negotiations directly between Mr. Vladimir Romanov for Viva and Mt. Andrey Raykov for Rual in connection with the confirmation of the foreseen payment of the loan of USD 3,500,000 under the MoU. Mr. Raykov made it clear that the said sum of USD 3,500,000 would be paid on the condition that Viva would deliver the entire quantity of 225,000 MT of Birac alumina.

[83]. Rual has always insisted on the delivery of the full quantity of 225,000 MT and has never waived any instalment or part of instalment under the Contract.

[84]. The deliveries from Viva continued to deviate from the monthly-agreed quantities and there was no indication by Viva when the outstanding quantities for the previous months were to be delivered.

[85]. The parties had agreed to sell the goods FOB. As the parties had not agreed on a shipping schedule in December 2003 as stipulated in the Contract, Rual contends that Viva was obliged to accept Rual's

nomination of vessels with respect to each monthly delivery. Furthermore, such nomination could be made at any time within each respective month.

[86]. When Rual nominated a vessel, Viva usually gave its acceptance of the nomination within one or two days. However, when Rual on 1 November 2004 nominated M/V Hans Oldendorf for loading of 25,000 MT:s alumina *"lay-can 15-21 November 2004"* the nomination was not accepted.

[87]. In a telephone conversation on 4 November 2004 between Mr. Greg Harris, the head of trading at Rusal Moscow and Mr. Vladimir Romanov, the latter explained that Viva did not intend to perform the Contract. The statement of Mr. Vladimir Romanov was a declaration of non delivery and as such a fundamental breach of the Contract which in itself entitled Rual to avoid the Contract.

[88]. As Rual, in view of the market situation, was anxious that the Contract would be fully performed Rual nevertheless gave Viva further time to prove that Viva would deliver the quantities. But no deliveries were made after Mr. Vladimir Romanov's statement on 4 November 2004.

[89]. The vessel was renominated on 11 November 2004 and Rual informed Viva at the same time that non-acceptance of the nomination would be treated, as a breach of the Contract. Rual sent another letter to Viva on 12 November 2004 stating that Viva's non-performance of the Contract would be considered as a fundamental breach of the Contract. Rual further asserted, with regard to invoiceNo 09, that Viva had not submitted a proforma invoice as provided by clause 11.1 in the Contract.

[90]. Viva responded to Rual's re-nomination on 15 November 2004. The response contained a statement that Mr. Vladimir Romanov did not in fact nor in law represent Viva and further that Viva was willing and able to sell alumina to Rual. However, the letter did not involve an acceptance of the nomination.

[91]. Rual sent another letter to Viva on 15 November 2004 by which Rual repeated its request that Viva should accept the nomination of vessels and to deliver a proforma invoice in accordance with the Contract.

[92]. Viva replied on 17 November 2004, explaining that Viva was not able to deliver the November quota until in December 2004 or January 2005 but offering no estimation when Viva possibly could deliver the quota for December 2004. Viva furthermore explained the shortage of deliveries by asserting that the refinery's demand for bauxite could not be satistied by the local exploitation, leading to the need to import bauxite from India. This import, according to Viva, had to be paid by alumina and that caused a shortage of alumina available for export to Rual.

[93]. After Viva had sent further messages to Rual with further dubious statements, suggesting excuses for non-deliveries of the alumina, Rual again on 23 November 2004 urged Viva to accept the nomination of the vessel and repeated its wanting that *"we will consider your behaviour as a fundamental breach of the Contract, which might cause us to terminate the Contract without prejudice to our claims for damages and losses we shall suffer and our right to claim repayment of USD 7,0 million plus interest."*

[94]. Viva replied on 24 November 2004, indicating that Viva could deliver the November quota during December 2004/January 2005. Rual, in a letter dated 24 November 2004, responded by stating that

Viva's approach was positive but requested an immediate answer as to what tonnage of the November quota and laydays in Ploce that Viva was prepared to allocate. Rual's response cannot be regarded as an extension of time tor Viva to deliver the November quota.

[95]. On 25 November 2004 Viva sent a letter stating that Viva would not, due to deliveries of alumina to India, be able to give an exact answer to Rual's question.

[96]. In a final attempt to persuade Viva to perform the obligations under the Contract, Rual set an additional period of time for Viva's performance by nominating the vessel M/V Amanda Sea with lay-days at the port of Ploce on 18-25 December 2004. This was done in a letter dated 26 November 2004.

5.2.3 Viva's suspension

[97]. On 2 December 2004 Viva "suspended" its performance after having for several weeks kept Rual in doubt in respect of the time and quantities of the shipments and after repeated confirmations of Viva's willingness and ability to deliver. This was a definite message to Rual that Viva was unwilling and unable to perform the Contract, since the "suspension" was not justified.

[98]. On 31 October 2004 Viva had issued invoiceNo 09 in the sum of USD 775,928.44. The invoice was wrongfully dated 31 August 2004, and did not comply with the payment instructions of the Supplemented Agreement. To be certain that the payment of the invoice was made correctly and could not be contested by Viva, Rual, in its letters of 11 and 12 November 2004, stated that the invoice was not issued in accordance with the Contract and requested a correct invoice from Viva. Rual's request indicated that Rual would pay the invoice as soon as it had been corrected.

[99]. Viva asserts that Viva sent a letter dated 30 November 2004 stating that Viva would not accept any nomination of vessels unless Rual paid invoiceNo 09. Rual denies that Rual received such letter before it was sent to Mr. Sergey Tikhomirov of Rual by e-mail on 13 June 2005. Rual suspects that the letter is a retroactive construction.

[100]. Rual is puzzled by the fact that the letter in the attachment sent to Rual on 13 June 2005, is dated 30 November 2004 and requests payment on 1 December, but the e-mail states that the letter was sent on 2 December 2004 at 3:24 PM. That means that also according to the e-mail, the message was sent after the end of the fixed time set out in the letter. That also implies that the e-mail including the letter dated 30 November 2004, is set out to be sent approximately two hours after the statement of the *"suspension"* of the Contract was made - the letter including the so called suspension was according to the head of the message sent by e-mail on 2 December 2004 at 1:28 PM.

[101]. Even if the letter would have been sent to Rual in due time, Rual claims that Viva did not have the right to suspend the Contract as the invoice was misdated and not issued in accordance with the Supplemental Agreement Rual had made this clear to Viva and Viva had not changed the invoice. Consequently Rual had no obligation to pay the invoice; Rual is still not obliged to pay the invoice.

[102]. In order to rightfully suspend the Contract, a substantial anticipated breach of contract must

become apparent This is a strict condition of a high degree of objective probability for non-performance. It means that Viva has to show that it was apparent that Rual would not pay future (correctly issued) invoices from Viva, that this would constitute a substantial part of Rual's obligations and that the non-payment was due to a serious deficiency in its ability to perform or in its creditworthiness.

[103]. Rual asserts that whether or not invoiceNo 09 was due for payment Rual's non-payment was not enough to give Viva the right to suspend the Contract. As Rual had indicated that it would pay the invoice if it was correctly issued Viva could not have suspected that Rual would not pay a correctly issued invoice. Rual treats Viva suspension of the Contract as a declaration of non-delivery and a fundamental breach of contract.

[104]. The attention of the Arbitral Tribunal shall also be drawn to the fact that the letter of 2 December 2004, alleging "suspension", does not refer to the non-payment of the (incorrect) invoice. Nor does it refer to Viva's alleged letter of 30 November 2004 but to Rual's *"recent letters".* It is not clear what Viva intends with the reference to Rual's recent letters. The letter also refers to *"obligations"* which must mean more than one obligation. The alleged *"suspension"* does not specify which obligations Rual has not fulfilled. There is no indication in the letter that it refers to the non-payment of the incorrect invoice

5.2.5 Breaches of contract - Avoidance

[105]. As a direct result of the fundamental breaches of contract described above Rual avoided the Contract on 6 December 2004 (with respect to the quantities not delivered) and held Viva fully liable for any and all damages, costs and losses including but not limited to loss of profit that Rual has suffered as a result of Viva's failure to fulfil the Contract.

5.3 Viva and Mr. Vladimir Romanov were misleading Rual, misrepresented and acted in breach of Viva's duty of loyalty in relation to Rual

[106]. With respect to good faith Rual contends that Mr. Vladimir Romanov, when the Contract was concluded, acted as the party with which Rual made the relevant agreements. It was clear to Rual that Viva was a company wholly controlled by Mr. Vladimir Romanov. The position of Viva, with regard to Mr. Vladimir Romanov's role in concluding the Contract and in the operational matters that followed during the contractual period, has varied from not acknowledging any participation of the Romanovs (in the letter to the Institute on 1 April 2005), to admitting involvement on the basis of a *"consultancy agreement"* between Mr. Vladimir Romanov and Viva (in the Statement of Defence). The consultancy agreement had never before been heard of by Rual. Viva must have been aware of Mr. Vladimir Romanov's actions in connection to the Contract. Viva must also have realised Rual's confidence in Mr. Vladimir Romanov as a duly authorized representative of Viva. Yet, Viva said nothing to correct Rual's alleged misconception of the facts.

[107]. On 3 August 2004 Rual paid to Viva the sum of USD 3,500,000 in respect of the Loan Agreement, on the assumption that Viva would deliver the shortages relating to the previous months and the full quantity up to 250,000 MT:s +/- 10 %. However, Mr. Vladimir Romanov subsequently sold quantities of alumina committed to Rual to a third party in India. Viva informed Rual about this in the letter dated 15 November 2004. Viva had thus misled Rual as Viva had represented to Rual that it would receive the full quantity of alumina under the Contract. Rual was also mislead when Viva stated, also on 15 November 2004, that it was willing and able to sell alumina to Rual. Furthermore, by its letters of 24 November 2004, 25 November 2004 and 30 November 2004 Viva continued to lead Rual to believe that Birac/Viva intended to perform the Contract.

5.4 Viva has accepted the avoidance of the contract

[108]. Rual's avoidance of the Contract 6 December 2004 was met with silence by Viva. It was not until 30 June 2005, almost seven months after the Contract had been avoided, that Viva contested the validity of the avoidance of the Contract. As Viva remained silent, Rual had good grounds to rely on the fact that Viva had accepted the avoidance of the Contract. As a result hereof, Viva is bound to accept the avoidance of the contract. Viva is furthermore precluded, due to its passivity, from all possibilities to contest the validity of the avoidance. In any event, the passivity of Viva constitutes a presumption that Rual had the right to declare the Contract avoided.

5.5 Preclusion of the right to avoid the contract

[109]. Viva has argued that Rual had, by 6 December 2004, lost its right to declare the Contract avoided with respect to the shortfalls of the January to October instalments.

[110]. The shortfalls of deliveries constituted a delay or late delivery which means that Rual has not lost its right to declare the Contract avoided until *"a reasonable time after he has become aware that delivery has been made*" (Article 49(2)(a) of CISG). Rual had the right to declare the Contract avoided with respect to the shortfalls of the former deliveries, until Viva had delivered these quantities. As Viva has not delivered the outstanding quantities Rual has not lost any right to declare the Contract avoided with respect to these quantities.

5.6 Calculation of damages

[111]. The shortfall of delivery of alumina under the Contract amounts to 71,235 MT:s and the agreed price per MT was USD 286.

[112]. Article 75 of the CISG states the following:

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.".

[113]. Thus, Rual asserts that it, pursuant to Article 75, has a right to claim compensation for possible cover purchases resulting from Viva's breaches of contract.

[114]. Following Rual's avoidance Rual purchased alumina elsewhere to cover the shortfall. Such agreement was entered into 27 December 2004 between Rual and Sirinidia Trading AG. By the additional contract, Rual bought a total quantity of 17,616 MT of Metallurgical Grade Alumina for the price of USD 350 per MT, FCA Pavlodar to be delivered within January — February 2005.

[115]. According to Article 75 of the CISG, it is, first of all, the difference between the contract price and the price in the substitute transaction that the buyer is allowed to claim. As the substitute contract set a price of USD 350 per MT, the difference from the price of the Contract is thus 350 - 286 = USD 64 per MT. The additional cost for the substitute purchase that Rual is entitled to claim pursuant to Article 75 of the CISG therefore amounts to 64 x 17,616 = USD 1,127,424.

[116]. However, as the substitute only covers part of the shortfall, Viva shad compensate Rual for the remaining shortfall of 71,235-17,616 = 53,619 MT in accordance with the spot market price in December 2004 for such quantity, see article 76 CISG. According to contracts concluded at the relevant period, the market price was USD 415 per MT. Consequently, Viva shall compensate Rual for the damages and losses with USD 1,127,424 + (415-286) * 53,619 = USD 8,044,275.

5.7 MoU

[117]. Under the MoU Rual lent USD 3,500,000 to Birac/Viva and made an investment of USD 3,500,000 in the Birac refinery.

[118]. The background to the MoU was the following. In January 2004 Mr. Vladimir Romanov informed Rual that it was impossible to fulfil the Contract without an investment being made in the Birac refinery. Given the great importance that a secured monthly delivery of alumina had for Rual, Rual accepted to provide funds for the benefit of the refinery and the Contract was amended to the effect that the MoU would be concluded as a part of the transactions. It was thus a pre-condition that the money would be used for repairing the Birac refinery and that Viva would perform the Contract.

[119]. When the aforesaid Loan Agreement was formalized the Parties agreed that disputes under the Loan Agreement would be resolved by arbitration in accordance with the Swiss Rules of International arbitration of the Swiss Chamber of Commerce.

[120]. It has been brought to the attention of Rual that the USD 7,000,000 under the MoU has not been used for the purposes agreed upon between Mr. Vladimir Romanov and Mr. Andrey Raykov.

[121]. Due to the fundamental breaches of the Contract described above, causing the avoidance of the Contract and due to the fact that Viva has not used the money as agreed, Rual has requested that Viva must repay both the loan of USD 3,500,000 and the investment of USD 3,500,000.

[122]. Viva has neither repaid the Investment nor repaid the USD 3,500,000 loan due for repayment by the expiration of May 2005. Rual's claim for repayment of the Investment is covered by the claim for

payment in this arbitration.

5.7.1 Jurisdiction of the Arbitral Tribunal

[123]. Rual maintains that the Tribunal has jurisdiction over disputes over the Investment.

[124]. The relevant section of the arbitration clause in the Contract provides:
"Any dispute, controversy or claim arising out of or in connection with the present contract, including the execution, performance, breach, termination or invalidity thereof shall he finally settled by the arbitration in accordance with the Rules of Arbitration Institute of the Stockholm Chamber of Commerce".

[125]. Rual asserts that the agreed clause does not just cover the Contract itself, but the entire legal relations between the parties and that the arbitration clause shall be interpreted in the widest meaning, as long as the Arbitral Tribunal's jurisdiction has not been limited by the parties. As the Investment, contrary to the Loan Agreement, which provides for different dispute resolution, does not specify that the parties should settle disputes in any specific form other than provided by the Contract, the Contract's provision in this regard shall prevail. Furthermore, if the Parties had desired to limited the arbitration, clause to disputes under the Contract the Parties would have agreed on wording to the effect that the arbitration clause covers disputes *"under the contract"* and not, as is the case, disputes *"arising out of or in connection with the present contract".* The latter formulation implies that the arbitration clause covers the entire legal relationship between the Parties.

[126]. Rual's asserts that as it was a precondition for the MoU that Viva would perform the Contract in full the arbitration clause must cover disputes under the Moll. Rual further argues that the MoU was so closely connected to the Contract that the arbitration clause in the Contract gives jurisdiction for the Arbitral Tribunal over disputes arising out of the MoU.

[127]. Rual also asserts that the attitude and practice in Sweden indicate that the interpretation of arbitration clauses has become more extensive in recent years. This is evident due to the purpose of arbitration, i.e. the aim of the parties is to have all disputes tried in the same tribunal.

5.8 Negotiations prior to arbitration

[128]. In the statement of Defense Viva has argued that Rual made no efforts to resolve all disputes and arguments by way of mutual negations, as provided in article 17 of the Contract. Rual contests Viva's allegation and claims that Rual made several attempts to initiate negotiations.

5.9 Viva's counterclaim

[129]. Rual has paid all invoices that are due for payment the day after Rual has received them. Rual

asserts that invoice noNo 09 is not due for payment.

[130]. The invoice is incorrectly dated (it states August, not October), and the payment instructions differ from the payment instructions of the Supplemental Agreement.

[131]. In a letter of 11 November 2004 Rual requested Viva to correct the mistakes, and stated that Rual would pay the invoice as soon as the changes were made. Viva has neither replied to that request, nor sent Rual a correct invoice. Due to the failure of Viva to produce a correct invoice, it is still not due for payment.

6. VIVA'S DEVELOPMENT OF ITS CASE

6.1 The Contract - Delivery of goods by instalments

[132]. By the Contract Viva undertook to supply to Rual 250,000 MT (+/- 10%) of alumina during 2004. The Contract contemplated (see Article 9) that the alumina would be supplied in 12 monthly shipments (January to December 2004), each of 20,800 MT (+/- 10%), i.e. a minimum of 18,720 MT. As the Contract called for the delivery of generic goods in separate lots, by successive deliveries, it was a contract for the delivery by instalments within the meaning of Article 73 of the CISG.

[133]. Rual was aware that the production plant of the alumina delivered would be the Birac Alumina refinery and that the Birac refinery required repairs.

[134]. The Contract provided that the exact shipping schedule was to be mutually agreed between the parties in writing not later than 25 December 2003. However, no shipping schedule was ever agreed or finalised or even required by Rual, and alumina was shipped on an ad hoc basis as follows:

[135]. Either (1) Rual made inquiries with Viva as to the precise quantity of alumina that would be allocated for a specific month and what "slots" for laydays, as the parties described them) were available at Ploce to ship the alumina or (2) Viva advised Rual what quantity was to be allocated and, on occasions, what slots were still available at Ploce port. Rual then made a nomination that matched the allocated quantities and the slots notified by Viva (if any). Viva would subsequently refer the nominations to the port authorities at Place to ensure that the port could accommodate the vessels for the relevant laycan and then revert to Rual. Nominations would not be accepted if Place port could not accommodate the vessels for the chosen laycans. In such circumstances, Rual did not insist that its nomination was accepted but nominated a different vessel with a different laycan. Thus the parties mutually agreed when the delivery should take place.

[136]. The practice which the parties adopted for fixing the delivery date for each instalment, namely by agreement between the parties, displaces any right for the buyer to fix the delivery date which might otherwise have been imposed by INCOTERMS 2000.

6.2 Avoidance of a contract for delivery of goods by instalments: Article 73 CISG

[137]. Viva asserts chat Rual has no right to avoid the Contract as a whole or with respect to the outstanding deliveries and/or the November instalment.

[138]. Article 73 of the CISG reads as follows:
In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

[139]. Viva asserts that, pursuant to Article 73(1) of the CISG, a failure by one party to perform his obligations in respect of any particular instalment will entitle the other party to declare the contract avoided with respect to that instalment if the failure constitutes a fundamental breach of contract with respect to that instalment.

[140]. Delivery by Viva of less than 18,720 MT of alumina each month January through December 2004 might have given Rual the right to avoid that instalment, but only if two conditions were fulfilled. First, Rual would need to show that Viva's failure to deliver 18,720 MT in any particular month amounted to a fundamental breach of contract with respect to that instalment. Second, Rual would have had to deciare the contract avoided with respect to that instalment within a reasonable time.

[141]. Article 9 of the Contract states that *"Exact shipping schedule for 2004 to be mutually agreed between BUYER and SELLER in writing not later than 25 December 2003"*. No such schedule was ever agreed. As a result, and in accordance with Article 33(b) of the CISG, the date for delivery of each instalment (to the extent not agreed otherwise) was on or before the last day of each calendar month during 2004. But if delivery of a particular instalment was later than the last day of a particular month, that delay would not oin itself amount to a fundamental breach. If Rual had wanted to be entitled to avoid any single instalment in the event that Viva did not make delivery of 18,720 MT by the last day of any month, the Contract should have specified (a) that it bad been agreed that it was important to Rual that it receive delivery of an instalment by or on a specified date and (b) that should Rual not receive delivery in full of the specified quantity by that date they (the parties) would consider that Viva was in fundamental breach with respect to that instalment. The Contract did not so provide. In practice the parties took a very flexible view as to delivery times, which were fixed on an ad hoc basis. As a result, if Rual had wanted to avoid an instalment for late delivery it was obliged to fix an additional time for Viva to perform its delivery obligation.

[142]. As Rual, prior to its letter to Viva dated 6 December 2004, never declared the Contract avoided with respect to any particular instalment by reason of any short delivery which occurred between January 2004 and October 2004, Rual had lost the right to do so with respect to those instalments.

[143]. With respect to the buyer's right to avoid a contract article 49 of the CISG provides that the buyer can avoid due to either late delivery (Article 49(2)(a)) and any breach other than late delivery (Article 49(2)(b)). Where a seller delivers only a part of the goods contracted for or fails to make

delivery completely, the missing portion of the goods contracted for is not delivered. It is a misuse of language to refer to that situation as one of *"late delivery".* Accordingly Rual's interpretation of the right to avoid the Contract with respect to *"late delivery"* is not adequate.

[144]. Rual has argued that m the case of partial delivery, the right to avoid the contract remains until the seller has made delivery of the shortfall. Rual's interpretation implies that Rual never loses the right to avoid unless the seller subsequently delivers the missing portion of the goods. Viva asserts that such an interpretation is not reasonable or logical.

[145]. Viva claims that Rual has misunderstood the rules of avoidance.

[146]. As the parties agreed on the quantity of alumina that was to be delivered in any calendar month on ad hoc basis, Viva was never in breach of the Contract by reason of the quantities of alumina it actually delivered to Rual between January and October 2004, inclusive. The parties are to be considered as having agreed to postpone the delivery of the shortfall until a later date, to be agreed. If Rual had wanted to impose a time limit on Viva within which it required delivery of the shortfall, it was obliged to comply with the provisions of Article 47(1) of the CISG (which it failed to do). Article 47(1) specifies that a buyer *"may fix an additional period of time of reasonable length for performance by the seller of his obligations".* None of the letters sent by Rual to Viva in November 2004 constituted a notice of fixing an additional period of time for delivery by Viva of the accumulated shortfall. At best the letters constituted an attempt by Rual to fix the time for Viva to agree the nomination of a vessel for delivery of the November instalment. Accordingly Rual was not entitled to avoid the Contract with respect to the shortfall in prior deliveries.

[147]. Viva recognises that a right to avoid a contract in its entirety for failure to make complete delivery by the contractual delivery date may arise after the buyer has fixed an additional period of time for the seller to perform his obligations pursuant to Article 47(1) of the CISG. This is especially critical in situations when, as in this case, the contract does not include a term making the time for delivery of any monthly instalment essential. Consequently, Rual could not exercise any rights under Article 47(1) of the CISG without giving Viva a notice which was expressed in such a way as would make it clear to Viva beyond any doubt that failure to deliver the instalment by the end of the specified additional (reasonable) period would entitle Rual to declare the Contract avoided with regard to that instalment.

[148]. Viva denies that any of the letters which Rual sent to it in November and December 2004 constituted a valid notice of fixing an additional period of time for performance of the delivery obligation in relation to the November instalment.

6.3 December 2003 - January 2004

[149]. Viva informed Rual on 24 December 2003 that, due to some technological problems, Viva could only load 10,000 MT FCA Birac in January 2004. However, Rual wished the alumina to be delivered FOB Ploce. Viva subsequently shipped 5,887,542 MT FOB Ploce. Rual did not seek to exercise any remedy that would have been available to it, had Viva been in breach of the Contract in failing to deliver more alumina.

[150]. On 22 January 2004 the parties met and signed the Supplemental Agreement. The Supplemental Agreement stipulated that the additional amount should be paid independently upon presentation by Viva of a separate invoice and that the payment was to be made within three working days from presentation of such invoice. The Supplemental Agreement further contained detailed payment instructions.

[151]. On 22 January 2004 the parties also concluded a separate agreement, the MoU, in which it was stated that Rual was to make a USD 7,000,000 investment in *"general repairs, maintenance of various machinery and equipment and infrastructure"* of the refinery in Birac, which Viva represented.

6.4 February - April 2004

[152]. In February, March and April 2004 Viva shipped the amounts of 22,106,564 MT 23,639,153 MT and 19,424,091 MT, respectively, and Rual raised no complaint about the amount of alumina shipped.

6.5 May - June 2004

[153]. In May 2004 Viva loaded 13,464,872 MT of alumina. Rual did not fix any additional period of time for Viva to deliver any shortfall relating to the May instalment due under the Contract, nor did Rual seek to declare the Contract avoided in respect of the May instalment.

[154]. In June 2004 Viva delivered 8,958,586 MT of alumina. In a letter to Viva dated 23 June 2004 Rual raised concerns about the quantities of alumina delivered. Rual further expressed itself content to leave it to Viva to make up for any accumulated shortfall by the end of 2004, thereby accepting that the shortfall would be made up by the end of the contract period.

[155]. Notwithstanding the concerns it had raised, Rual continued to pay invoices as they fell due. Rual did not fix any additional period of time for Viva to deliver the shortfall relating to the May and June instalment, nor did Rual seek to declare the Contract avoided in respect of the May and June instalment.

6.6 July - August 2004

[156]. In the middle of July 2004 negotiations took place between the parties resulting in an agreement that Rual should pay Viva the outstanding sum of USD 3,500,000 with respect to the Loan Agreement. In return, Viva should resume the shipments of alumina. Rual paid the sum of USD 3,500,000 to Viva on 3 August 2004. Viva delivered 6,050,514 MT of alumina on 29 July 2004 and 20,525 MT of alumina during August 2004. Rual continued to pay invoices as they fell due, including invoice no. 8. Rual did not fix any additional period of time for Viva to deliver the shortfall relating to the July instalment, nor did Rual seek to declare the Contract avoided in respect of the July instalment.

6.7 September - October 2004

[157]. During September 2004 Viva shipped 15,492 MT of alumina to Viva. Rual did not seek to exercise any remedy that would have been available to it, had Viva been in breach of the Contract because of the quantity of alumina thus far supplied.

[158]. On 31 October 2004 Viva issued invoiceNo 09 for USD 775,928.44. As a result of a clerical error, invoiceNo 09 has the same date (31 August 2004) as invoice no. 8, but it is clear from the text of the invoice that it relates to shipments in September and October 2004.

6.8 November - December 2004

[159]. By e-mail dated 1 November 2004 Rual nominated the vessel M/V Hans Oldendorf (Ploce 15-21 November) to load 25,000 MT of alumina. As Viva experienced transportation problems between Birac and port Ploce, Viva was unable to accept the nomination.

[160]. By letters during November 2004 to Viva, Rual emphasised that it had nominated a vessel for acceptance by Viva in relation to the November shipment but that Viva had failed to react Rual further requested Viva to perform according to the Contract and stated that nonperformance would be seen as a fundamental breach of the Contract. The letters did not fix an additional period of time within which Viva was to perform its obligations in relation to the November instalment.

[161]. On 15 November 2004 Viva concluded a contract for supply of Birac alumina to Ashapura Minechem Limited in India. This contract was concluded as the Birac refinery suffered from a shortage of local bauxite supplies (the mined material from which alumina is refined) and Ashapura Minechem Limited could provide bauxite if Viva would sell alumina to them. As Viva sold alumina to Ashapura Minechem Limited, Viva's ability to perform under the Contract by delivering the November instalment to Rual in November was in jeopardy. Viva informed Rual about this and asserted that Viva was ready, willing and able to sell the alumina to Rual and that the November shipment could be delivered in December 2004/January 2005 (letter of 24 November 2004). By its letter 24 November 2004 Rual said that it found Viva's approach *"positive"*. Viva understood that to be an agreement to the additional time that Viva had requested. This letter too did not fix an additional period of time for Viva to perform its obligations under the November instalment- Viva responded to Rual's letter the following day and said it would, in the first days of December, specify when delivery could be made.

[162]. However, by letter to Viva dated 26 November 2004 Rual indicated that Viva's statement of 24 November 2004 was unacceptable. Rual alleged that Viva had failed to supply the November and December shipments notwithstanding Rual's various requests and nominations of vessel. Rual's letter went on to nominate vessel M/V Amanda Sea for loading 18,000 MT of alumina for loading 18,000 MT +/- 5% for laydays at Ploce on 18-25 December 2004, and asked Viva for acceptance of the nomination of the vessel by 12 noon London time on 30 November 2004. Rual's request for 18,000 MT of alumina exceeded the previously agreed amount of 15,000 MT for the November shipment. It is difficult to consider this letter to be one fixing an additional period of time for Viva to perform its obligations under the November instalment since it failed to make clear by use of suitable words

that this was a letter requiring performance of the obligations under the November instalment by a specific date. The words used were insufficient to fix an additional period of time within the meaning of Article 47(1) to the CISG. Moreover, even if the letter could be considered as one pursuant to Article 47(1) of the CISG, the period of additional time fixed by it was wholly unreasonable (less than 4 days, including a Saturday and Sunday).

[163]. By reply 30 November 2004 Viva requested an extension of time to the request for acceptance of vessel nomination until 2 December 2004. In its letter of 1 December 2004 Rual extended the time for Viva to reply to the letter of 26 November to 12 noon Moscow time on 2 December 2004, i.e. a further period of less than 2 days. This letter also does not fix an additional period of time for Viva to perform its obligations under the November instalment; and even if the letter could be considered as a notice given pursuant to Article 47(1) of the CISG, the period of additional time fixed by it was wholly unreasonable (less than 2 days in addition to the prior period of less than 4 days). Moreover, the rights expressly reserved by Rual by its letter dated 1 December 2004 were *"to receive delivery of the outstanding quantities for November and December"* and did not expressly include any other rights.

[164]. Viva seat another letter on 30 November 2004 indicating that it would not be able to accept any nomination if Rual did not, by noon 1 December 2004, pay the outstanding amount of USD 775,928 due on invoice No 09.

[165]. As Rual completely ignored the principal issue between the parties - namely, Rual's failure to pay invoiceNo 09 - Viva felt that it had no choice but to write to Rual on 2 December 2304 and declare that Viva suspended the Contract performance.

[166]. Instead of making payment on invoice No 09 and obtaining information about possible delivery dates and quantities etc., Rual declared the Contract as a whole avoided on 6 December 2004.

[167]. Very shortly thereafter (on 10 December 2004), Rual submitted a Request for Arbitration.

[168]. Rual made no effort to resolve all disputes and arguments in connection with the Contract by way of mutual negotiation, as required by Article 17 of the Contract.

[169]. Viva could not have been in breach of any obligation to make delivery by 30 November 2004 until 30 November 2004 had passed without delivery having been made. Accordingly Viva denies it was in breach of the obligation to deliver the November instalment at the time of Rual's letters dated 11 November, 12 November, 15 November, 23 November, 24 November or 26 November 2004.

[170]. Nothing in Viva's correspondence between 24 November 2004 and 6 December 2004 gave any grounds for Rual to conclude, let alone any good grounds to conclude, that a fundamental breach would occur with respect to future instalments.

[171]. At the time of Rual's notice of avoidance, more than 3 weeks of December remained during which Viva could have delivered the December instalment. Thus, even if Rual had the right (which Viva disputes) to avoid the Contract with respect to the November instalment, Rual had no grounds to conclude that a fundamental breach of contract would occur with respect to future instalments. By sending its notice of avoidance dated 6 December 2004 Rual wrongfully repudiated the Contract.

That notice is in itself a fundamental breach of the Contract.

6.9 The cumulative shortfall by the end of November 2004

[172]. Viva argues that each monthly instalment was "closed" when a reasonable time bad elapsed and that Rual's right to give any notice of avoidance must have been exercised before the instalment was "closed", otherwise Rual lost this right.

[173]. Viva further states that if Viva remained under an obligation to deliver a total of 225,000 MT of alumina by the end of the contract period as indicated in Rual's letter dated 23 June 2004, the consequence was that until the end of the contract term (initially 31 December 2004 but subsequently extended by Viva's request dated 24 November 2004 and Rual's letter dated 24 November 2004), Rual was not entitled to complain of any cumulative shortfall below the contractual amounts which had resulted from the deliveries that had already taken place. For these reasons Rual was not entitled to terminate the Contract by arguing that the accumulated shortfall amounted on 6 December 2004 to a fundamental breach of the Contract by Viva.

6.10 Viva's notice of suspension/Anticipated non-performance by Viva

[174]. A party may suspend the performance of his obligations if it becomes apparent that the other party will not perform a substantial part of his obligations.

[175]. By letter dated 30 November 2004 Viva notified Rual that it would not be able to accept any nomination of Rual's vessels if Rual did not pay Viva the outstanding liability of USD 775,928.44 under invoice No 09.

[176]. The supposed reason for Rual's non-payment of invoiceNo 09, i.e. that the payment instruction were not in compliance with the Supplemental Agreement, was entirely spurious. Viva's prior invoices under the Supplemental Agreement all gave the same payment instructions as were given in invoiceNo 09, and all such prior invoices had been paid by Rual. Viva was entitled to draw the conclusion that Rual's refusal to pay invoiceNo 09 made it apparent that if Viva made delivery of the alumina due under the November instalment it would receive from Rual no more than that part of the price which Rual was obliged to pay in advance (namely the advance payment of 70% of USD 263 per MT i.e. USD 184) and that Rual would not perform its obligation to pay the balance due.

6.11 Mr. Vladimir Romanov

[177]. Viva asserts that Mr. Vladimir Romanov is not to be treated as if he were a party to the Contract and/or that he is in some other way or tor some other reason liable for Viva's obligations thereunder.

[178]. Mr. Vladimir Romanov participated in the negotiation of the terms of the Contract. He did so

pursuant to a consultancy agreement with Viva, and not as the alter ego of Viva. Viva denies that Mr. Vladimir Romanov held a key position as supplier of the alumina. The Contract was between Rual and Viva, and was uot with Mr. Vladimir Romanov.

[179]. Viva denies that the person deciding about deliveries of the alumina was Mr. Vladimir Romanov, or that it is relevant for purposes of this Arbitration whether or not he was. Viva admits that Mr. Roman Romanov (son of Mr. Vladimir Romanov) signed the Contract pursuant to a power of attorney issued on behalf of Viva by Mr. Eduard Mitelman.

[180]. Even if Mr. Vladimir Romanov had actual or ostensible authority to bind Viva, that does not assist Rual. Mr. Vladimir Romanov recalls that he did receive a telephone call at the beginning of November 2004 from Greg Harris of RUSAL (not Rual). Mr. Vladimir Romanov has no clear recollection of what was said by either person during this telephone call. At the time of the call Mr. Vladimir Romanov was on business outside Lithuania and the reception on his mobile telephone (which Mr. Harris called) was very poor.

[181]. Albeit Mr. Vladimir Romanov told Mr. Greg Harris on 4 November 2004 Viva *"did not intend to perform the Contract",* that did not give Rual the right to avoid the Contract as Rual failed within a reasonable time of that alleged statement to avoid the Contract (which Rual did 6 December 2004).

[182]. Furthermore, in reply to a letter from Rual referring to the alleged statement by Mr. Vladimir Romanov, Viva sent a letter to Rual dated 15 November 2004 in which it stated that *"Mr V Romanov neither in fact nor in law represent Viva Trade LLC and moreover does not have any power to give legally binding statements on behalf of Viva Trade."* At the time that letter was received by Rual, it had not yet avoided the Contract. That letter served tn give notice to Rual that Mr. Vladimir Romanov had no authority to bind Viva and that any authority which Rual believed Mr. Vladimir Romanov had to bind Rual was denied by Viva. In consequence Rual was not thereafter entitled to treat any statement which may have been made by Mr. Vladimir Romanov on 4 November 2004 as a declaration by Viva that it would not perform its obligations. All effect which the alleged statement had was entirely dissipated by the letter from Viva dated 15 November 2004, at which date no purported right of avoidance had been exercised.

6.12 Viva's acceptance of Rual’s avoidance of Contract

[183]. Rual alleges that Viva has accepted Rual’s avoidance as Viva remained silent until service of its defence in the arbitration proceedings. Viva contests this allegation. There is no provision in CISG which obliges a party to respond to a notice of termination.

6.13 Calculation of damages

[184]. As it is Viva’s case that Rual was not entitled to avoid the Contract, or indeed to avoid the November and/or December instalment, Viva denies that it is liable to pay any damages to Rual for breach of contract.

[185]. Without prejudice Viva pleads as follows with respect to the damages.

[186]. Viva alleges that the specimen contracts referred to by Rual do not show that the market price on the spot market price for semi-sandy alumina was USD 415 MT in December 2004. Viva disputes Rual alleged price and invites the Tribunal to accept the relevant price level at USD 325 per MT.

[187]. Viva asserts that there are three types of alumina produced in the world, floury, semi-sandy and sandy, and the price for these three types of alumina vary. The alumina produced at Birac is semi-sandy.

[188]. As China is the biggest purchaser of alumina in the world, prices for sandy alumina payable in China are the standard by reference to which prices in other markets are set. To determine the price for semi-sandy alumina FOB Ploce in 6 December 2004 from the price for sandy alumina CIF China must be deducted the freight costs, the price difference between sandy and semi-sandy alumina and the additional financing cost involved in delivery from Ploce. Taking the above into account as well as the relevant contracts that have been produced in the proceedings, the price for semi-sandy alumina FOB Ploce 6 December 2004 was USD 325.

[189]. Viva remarks that Rual has not produced contracts which are relevant to asses the market price in December 2004 in spite of the fact that Rual reasonably could have obtained numerous such contracts. Viva believes that the reason therefor is that such contracts would have shown that the market price was much lower than asserted by Rual.

[190]. Viva emphasizes that it is incumbent upon Rual to show that it took such measures as were reasonable in the circumstances to mitigate the alleged loss resulting from the alleged breach. Rual should have made a substitute transaction for Birac alumina by entering into a contract to purchase substantial quantities of alumina from Birac, whilst reserving its rights to exercise the remedies provided under the CISG, Viva/Birac had substantial amounts of alumina available for third parties in the beginning of 2005.

6.14 MoU

[191]. Rual claims repayment of the Investment that was paid by it to Viva on 7 April 2004. The basis of Rual's claim appears to be that Rual agreed to pay such sum on condition that Viva *"agreed to perform the Contract",* or that the payment was *"conditional upon a fulfilment by Viva of the deliveries of alumina",* and that Viva would use the money *"for the purposes agreed upon*". Rual also argues that Viva is liable to repay the USD 3,500,000 paid under the MoU by reason of (1) Viva's failure to apply the money in *"general repairs, maintenance of various machinery and equipment and infrastructure of Birac Alumina Refinery"* and (2) Viva's fundamental breach of the Contract. Viva disputes this.

[192]. Viva asserts that the Arbitral Tribunal does not have jurisdiction over the MoU.

[193]. There is no evidence that the parties agreed or had any need to agree that any dispute arising in relation to the matters addressed in the MoU should be dealt with under the arbitration agreement

contained in the Contract. The fact that the MoU is silent on the issue of arbitration implies that the parties did not intend to apply the arbitration clause in the Contract to the MoU.

[194]. Viva does not dispute that the words *"arising out of or in connection with the present contract"* are broad in nature and will in most cases embrace a wider range of subject matter than such phrases as *"under the contract".* However, such scope is not without limit and the terms of the MoU are concerned with an entirely separate transaction and an entirely different legal relationship that operates independently of the relationship of buyer and seller of alumina created by the Contract.

7. REASONS FOR THE AWARD

7.1 The Counterclaim

[195]. It is undisputed that the amount invoiced by Invoice No 09 issued on 31 October 2004 albeit incorrectly dated 31 August 2004 properly reflected the amount to be paid by Rual under the Supplemental Agreement for the September/October 2004 deliveries specified in the invoice. Rual's only objection is that the date of the invoice was incorrect and that the payment details differed from those prescribed in the Supplemental Agreement.

[196]. As emphasized by Viva the payment details in invoice No 09 were identical to those contained in a number of previous invoices under the Supplemental Agreement, all of which Rual had paid without protest.

[197]. Whether or not Rual was entitled to request additional documentation confirming the appropriateness of invoice No 9, there is no question that once the amount has been claimed in this arbitration through duly empowered counsel any doubt as to whether the amount was due and payable must have been removed. There is furthermore no reason why Rual should not be liable for interest on the invoiced amount as claimed by Viva.

[198]. Whether Rual has a valid damage claim against which the counterclaim is to be set off is the subject to which the Arbitral Tribunal will turn next.

7.2 The legal significance of the shortfall in deliveries January - October 2004

[199]. The shortfalls accumulating in the period did not cause Rual to claim a right to avoid the contract with respect to any one of the individual instalments then delivered. Nor did Rual, however, lose its right to claim delivery of the shortfall. This follows from Article 46(1) of the CISG, according to which the buyer retains his right to demand performance unless and until he has resorted to a remedy inconsistent therewith. Furthermore, Article 49 (2) (b) of the CISG does not apply to the situation at hand. This is so because it was apparent to both Parties that part of the delivery was outstanding - i.e. delayed - and Viva had furthermore expressed its intention to deliver the outstanding part later.

(See e.g. e-mail Tikhomirov-Vadopaliene of 20 April 2004 *"Kindly advise when and how are you planning to cover the shortfall.."* and response Vadopaliene-Tikhomirov same day *"Anyway, we promised to compensate quantities - that you have not picked up in January - not in May, but till the end of 2004".)* Such a situation does, contrary to what Viva contends, fall under Article 49 (2) (a) of CISG, the situation being different if the seller does not recognize that part of the delivery is outstanding. Going into November 2004, the situation was thus that Rual retained the right to demand delivery of future instalments as well as of the shortfall in previous deliveries which Viva had promised to make good before the end of 2004.

7.3 The legal significance of the events 1 November - 6 December 2004

[200]. Most exchanges regarding shipment of the monthly instalments had taken place between Rual's Mr. Tikhomirov and Viva's Ms. Vadopaliene throughout the period January - October 2004. On 19 October Ms. Vadopaliene had sent an e-mail informing Mr. Tikhomirov, inter alia, that he should address the top management in regard to the November quota. In the reply Mr. Tikhomirov had asked *who shall we speak to, senior or junior"* to which Ms. Vadopaliene replied *"please talk to senior".* During her testimony Ms. Vadopaliene confirmed that this last exchange referred to Mr. Vladimir Romanov ("senior") and Mr. Roman Romanov ("junior") but declined to confirm that the same applied to her expression"management", maintaining instead that her reply last cited should only be understood as expressing that if Mr. Tikhomirov for some reason wanted to speak with any of the Romanovs then he could talk to Mr. Vladimir Romanov. The Tribunal did not find this explanation wholly convincing.

[201]. 1 November 2004 Mr. Tikhomirov sent an e-mail to Ms. Vadopaliene including the following text: *" Dear Egle, I hope you had a good holiday. As per our agreement pls find below our nomination for 25k mts vessel for Ploce..".* The quantity of 25,000 MT for November had indeed been agreed in previous correspondence. This time no answer in substance was received.

[202]. Mr. Harris and Mr. Tikhomirov both testified that on 4 November 2004 a telephone conference occurred between Mr. Harris and Mr. Vladimir Romanov, conducted on a loudspeaker telephone with the assistance of an interpreter and with Mr. Tikhomirov overhearing the conversation. Their testimony was that Mr. Vladimir Romanov in the course of the conversation stated that delivery would not be made to a price as per the Contract but only if Rual agreed to pay a higher price of USD 415 per MT for the alumina. It is not entirely clear whether they maintained that Mr. Vladimir Romanov's statement addressed the November instalment only or further deliveries in general. Inasmuch as their statements are not contradicted by any other evidence, the Arbitral Tribunal accepts that it has been demonstrated that at least in respect of the November instalment Mr. Vladimir Romanov bluntly expressed that Rual did not intend to honour the Contract, but suggested that a revision of the agreed price was a precondition for delivery.

[203]. Rual maintains that since Mr. Vladimir Romanov as a matter of Wisconsin law had the power to represent Viva his statement amounted to a fundamental breach of contract by Viva, in itself entitling Rual to avoid the Contract.

[204]. Viva for its part maintains that the statement by Mr. Vladimir Romanov even if made had no legal significance since prior to Rual's acting on that statement Viva, by a formal letter of 15 November 2004, had expressly declared that Mr. Vladimir Romanov had no authority to represent Viva.

[205]. The Arbitral Tribunal notes that regardless of Mr. Vladimir Romanov's formal position it has not seriously been contested by Viva that be had powerful influence over Viva and that he was the individual who had negotiated the important commercial aspects of the Con tract. In the Arbitral Tribunal's opinion his statement was therefore, whether or not formally binding for Viva, a very clear indication that the Contract might not be honoured by Viva. This was all the more so since Ms. Vadopaliene appeared no longer to be handling vessel nominations as she had previously done.

[206]. Further correspondence followed. On 12 November 2004 Rual, now through its director Mr. Roman Khaev, wrote a letter to Viva through Mr. Mitelman mentioning the disturbing conversation with Mr. Vladimir Romanov and. urging Viva to confirm *"that the contract will be performed in accordance with its terms".* Viva through Mr. Mitelman on 15 November 2004, in the same letter wherein Mr. Vladimir Romanov's authority to represent Viva was denied, responded that Viva *"DO NOT REFUSE AND AS A MATTER OF FACT ARE READY WILLING AND ABLE/T/O SELL THE ALUMINA".* The expression "sell" rather than "deliver" was clearly a cause for concern to Rual, given the previous events.

[207]. The same day Mr. Khaev responded by again requesting a positive confirmation that the Contract would be performed in accordance with its terms, adding a request for an indication of time of delivery, proforma invoice and confirmation of vessel nomination - failing which Rual would consider Viva to be in fundamental breach of the Contract. Viva through Mr. Mitelman responded on 17 November 2004: *"One more time we would like to confirm that Viva Trade is willing and able to sell alumina to Rual Trade. - But because of the reasons that you failed timely to give us 3.5 min. USD credit we couldn't finance the development of the local bauxite quarries...In that way we are unconditionally forced to deliver alumina to bauxite suppliers."*

[208]. On 24 November Rual through Mr. Khaev again wrote to Viva threatening to avoid the contract, to which Viva through Mr. Mitelman now responded: ".. *we would like to let you know that we will have possibility to load to Rual contractual November alumina quantity during December 2004/ January 2005."*

[209]. Rual's response was this: *"We find yr approach positive, however, for vessel's nominations we would request you to indicate to us immediately what tonnage from the November quota and the laydays at Ploce you are prepared to allocate to us in December. We also request to send us asap yr usual prepayment invoice to cover alumina shipments in December 04. - Also please let us know as soon as possible when can we expect the balance of November quota and also when you are planning to give us the December quota.."*

[210]. Viva answered on 25 November 2004 still not giving any details for delivery: *"..because of the fact that alumina deliveries for bauxite to Indian supplier confused all our alumina deliveries schedule, at the moment we are not able to give exact answer to your questions... We will do that during the first days of December..."*

[211]. On 26 November 2004 Rual again emphasized its opinion that Viva was breaching the agreement,

adding: *"We are nominating mv Amanda Sea for loading....December 18-25, 2004. Await your acceptance of our nomination by return before 1200 London time, November 30, 2004."*

[212]. Rual thus gave Viva until 30 November 2004 to respond. The events from this day as described by Ms. Vadopaliene in her testimony were somewhat remarkable.

[213]. She testified that on 30 November 2004 she first on Mr. Mitelman's instructions sent a letter by fax to Viva with the following contents: *We refer to your letter dated 2004 November 26 regarding December shipment, - As December shipping schedule from port Ploce is not finally set we would like to ask you to let us answer you on Thursday December 2nd".*

[214]. She went on to say that on that same day she thereafter, also on Mr. Mitelman's instructions, transmitted as an attached file to an e-mail a second letter with entirely different content, namely the following: *"We refer to our phone talks. Please be informed, that we will not be able to accept any nomination of Your vessels if You will not pay by 12 p.m. Moscow time December 2004 outstanding debt of USD775 928.44 (seven hundred and seventy five thousand and nine hundred twenty eight dollars and 44 cents) under the invoice 9 as of 31st of August."*

[215]. But not only that, she also testified that on 2 December 2004 she likewise prepared two communications of seemingly contradictory content. One, which has unquestionably been received by Rual, contained the following: *"Referring to you recent letters we would like to inform you that because you do not fulfill your obligations we suspend the contract performance."*

[216]. The second communication she said she prepared was an e-mail attaching a proforma invoice for the next instalment to be shipped. This communication was not received by Rual at the time and Ms. Vadopaliene explained that she had discovered after pressing "SEND" on her computer that she had attached the wrong file to the e-mail, being not the proforma invoice but instead the aforementioned, second 30 November 2004 letter and that she therefore contacted the IT department and had the e-mail intercepted before it left the server.

[217]. There is no evidence that the second 30 November 2004 letter was received by Rual on that day. There is some support in the Kroll report invoked by Viva that it may have been sent but given *inter alia* that the analysis was not performed on the computer and server actually used at the time the evidence is far from conclusive.

[218]. In any event, regardless of whether the letter was sent at the time, it appears to the Arbitral Tribunal as an attempt to create an excuse for non-performance of the Contract. Already because the vessel nomination was for laydays in Ploce 18-25 December there was no *bona fide* reason to set a deadline for payment at 12 noon Moscow time already on 1 December 2004, i.e. the following day - a deadline that Viva would obviously have had practical difficulties in meeting. In the Arbitral Tribunal's assessment the letter, whenever drafted and sent, reflects Viva's intention to corroborate a suspension of the Contract on 2 December 2004, i.e. the day when Viva had requested to finally answer the nomination.

[219]. This said, it nevertheless remains to be considered whether Rual's failure to pay invoice No 09 as a matter of law did give ground for suspension. The Arbitral Tribunal thinks not Under Article 73 of the CISG, a party may suspend performance *"if it becomes apparent that the other party will not*

perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract." Viva had no reason to believe that Rual would not perform its obligations if Viva performed its. Furthermore Viva had an outstanding debt to Rual under the 3.5 MUSD loan which should have removed all fear that Rual would not meet its payment obligations to Viva.

[220]. The Tribunal thus concludes that Rual's notice of suspension was unwarranted and undertaken only to divert from Rual's own unwillingness to perform the Contact at the agreed price, an unwillingness which had been evidenced already by Mr. Vladimir Romanov's statement in the telephone conversation on 4 November 2004 and reinforced by the evasive and incoherent nature of the following correspondence from Viva preceding the notice of suspension.

[221]. Viva's conduct in the Tribunal's opinion amounted to a fundamental breach of the Contact and thus pursuant to Article 49 (1) (a) of CISG gave Rual reason not only to avoid the Contract as regards the November instalment but as regards the entirety of the unperformed parts thereof. In context, this is how the meaning of Rual's letter of avoidance of 6 December 2004 is to be reasonably understood.

[222]. It follows that Rual is entitled to damages under Articles 75 and 76 of the CISG.

7.4 Calculation of damages

[223]. It is accepted by Viva that, if Viva is liable to Rual damages are to be computed as the sum of USD 1,127,424, being the amount claimed by Rual for the substitute transaction of 17, 235 MT of alumina, and fair compensation for the remaining shortfall of 53,619 MT. Rual for this portion of the shortfall claims compensation based on a current market price of USD 415 per MT, while Viva accepts only USD 325 per MT.

[224]. Both parties have invoked expert evidence in support of their positions: Mr. Geddes' report and testimony for Rual and Mr. Sawyer's report and testimony for Viva. They differed principally on two points: (i) whether overall world market prices in respect of sandy grade alumina should be the basis for the computation or whether the market price for semi-sandy grade which was the subject of the Contract would be more appropriate and (ii) what the price for semi-sandy FOB Ploce on or about 6 December 2004 actually was.

[225]. In respect of the first question Rual's argument is that since there was no semi-sandy grade to be bought outside of the substitute transaction it actually undertook, any further spot purchase would have had to be of sandy grade alumina. For delivery in the Mediterranean that would in Rual's further submission have entailed a premium over world market prices due to freight costs.

[226]. In the Arbitral Tribunal's opinion this line of argument confuses the existence of a "current price" under Article 76 (2) of the CISG with actual availability of the product at that price where delivery should have been made under the Contract. If such price exists but the purchaser is unable to find goods in sufficient quantity at that price he may well be entitled to make a cover purchase from elsewhere, even of more expensive quality, and claim compensation for a substitute transaction made *de facto.* He cannot, however, in the absence of such transaction use as a basis for calculating

damages the current price for a higher quality product at a location different from the place where delivery should have been made under his contract.

[227]. While the world market price for sandy grade alumina seems capable of determination with some precision on the basis of Metal Bulletin and other sources, the current price for semi-sandy appears to be far less transparent. The opinion of the experts varied as to how big a discount in price semi-sandy would have compared to sandy grade. The Arbitral Tribunal accepts that in an overheated market with all plants running full capacity the difference should tend to shrink. It further seems established that the price of alumina CIF China in December 2004 was about 440 USD per MT. The experts estimated freight from the Mediterranean to China at some USD 55-65 per MT, which logically would suggest a current price for semi-sandy below USD 385 FOB Mediterranean port with some further discount for quality. The actual substitute transaction was at USD 350 per MT. Mr. Sawyer's report pointed at various other transactions at levels below that, while Mr. Geddes had identified one transaction at 387.5 USD per MT. He had a number of criticisms as regards the relevancy of the transactions mentioned in Mr. Sawyer's report while Mr. Sawyer pointed out that differences in freight to the end-user in Tadjikistan would give an equivalent price FOB Ploce below the USD 3.50 for the substitute transaction.

[228]. Apart from the market data discussed by the experts two facts seem of relevance. On the one hand, as emphasized by Viva, Rual should have been in a position to provide further data in support of the relevant current price for semi-sandy grade. On the other hand, the Arbitral Tribunal has accepted that on 4 November Mr. Vladimir Romanov suggested that a price of USD 415 per MT was appropriate for the November instalment, which gives an indication of his perception of then current prices.

[229]. On balance of the evidence the Arbitral Tribunal finds that the current price for semi-sandy grade alumina at the relevant time was USD 375 per MT. On that basis the damages in respect of the uncovered quantity is computed at USD 53,619 * (375-286) = 4,772,091. The total damages due Rual are thus USD 5,899,515.

7.5 Set-off

[230]. The damages due Rual carry interest as from 1 January 2005 until the date of this Award at a rate corresponding to the official Swedish reference rate plus 8 percentage units. As per the date of the Award the total amount due Rual is thus USD 5,899,515 plus 635,837, totally 6,535,352.

[231]. The amount due Viva under invoice No 09 carries interest as from 4 November 2004 until the date of this Award at the aforesaid rate. As per the date of the Award the total amount due Viva is thus USD 775,928 plus interest USD 95,913, totally USD 871,842.

[232]. The aforementioned amounts shall be set off whereafter the balance due Rual is USD 6,535,352 - 871,842 = USD 5,663,510 which amount should carry interest as from the date of this Award until payment.

7.6 Jurisdiction over the MoU?

[233]. The fundamental question to be answered is whether the parties mutually intended disputes over the MoU to be resolved by arbitration in accordance with the arbitration clause in the Contract To establish this, Rual - having the burden of proof - must establish not only that the parties when entering into the Contract intended to give their arbitration clause a meaning sufficiently broad to encompass also subsequent agreements in connection with the Contract. Rual must also demonstrate that when concluding the MoU the parties regarded that agreement so connected to the Contract as to fall under the arbitration clause.

[234]. There is undoubtedly some connection between. the Contract and the MoU as both agreements relate to Rual's desire to obtain delivery of alumina from Birac. However, other evidence indicates that the two agreements were not, at least not by Viva, regarded as governed by the same arbitration clause.

[235]. Notably, there are several versions of the MoU. The first draft appears to have envisaged the contracting parties as being UBIG and Rual. In the first signed version of the MoU Rual's counterparty was not Viva but Kauno Tiekimas. These previous versions were in all material respects identical to the final MoU. They thus contained no arbitration clause at all, and yet were clearly not subject to the arbitration clause in the Contract concluded between Rual and Viva.

[236]. Mr. Tikhomirov's testimony was that according to his boss — Mr. Raykov - and the inhouse lawyers the MoU was to be seen as an integral part of the Contract. Mr. Raykov's testimony was that the change to Viva was motivated by a desire to make the MoU such integral part.

[237]. However, the MoU covers both the Investment and the Loan. The Loan was later documented in a separate Loan Agreement which contains a governing law clause and an arbitration clause different from those of the Contract. If, as maintained by Mr. Raykov, Viva was named as a party to the MoU specifically to bring the MoU under the arbitration clause in the Contract, it is unexplained why this intention should have been subsequently altered when the Loan Agreement was made.

[238]. On this background the Arbitral Tribunal finds that Rual has not succeeded in demonstrating that the arbitration agreement embodied in the Contract gives the arbitrators jurisdiction to try Rual's claim under the MoU. That claim should therefore be dismissed for lack of jurisdiction and this Award shall accordingly be final in respect of both of Rual's claims.

7.7 Costs

[239]. The outcome is that Rual has succeeded only as regards part of its claim and has lost in regard to the counterclaim and the MoU claim. On the other hand, the predominant issue in the proceedings has been whether or not Rual's avoidance of the contract was justified and on this issue Rual has been successful. On balance the Arbitral Tribunal finds that each party should bear its own costs and as between them half of the costs for the Arbitral Tribunal and the Institute.

8 AWARD

[240]. 1. Viva Trade L.L.C. (Viva) shall pay to Rual Trade Ltd (Rual) USD 5,663,510 (United States Dollars Fivemillionsixhundredsixtythreethousandfivehundredand-ten) and interest thereon, at a rate corresponding to the interest rate as semiannually determined by the Bank of Sweden plus 8 percentage units, from this day until full payment has been made;
2. Rual's claim for repayment of 3.5 MUSD invested under the Memorandum of Understanding dated 22 January 2004 is dismissed for lack of jurisdiction;

3. Each party shall bear its own costs for the arbitration;

4. The fees and costs of the Tribunal and the Arbitration Institute of the Stockholm Chamber of Commerce (Institute) as determined by the Institute are fixed at

a.	for the Institute	EUR 23 585;
b.	for Mr. Nilsson	EUR 96 595 of which 77 276 as fee and 19 319 as VAT;
c.	for Prof. Ramberg	EUR 46 366;
d.	for Mr. Brocker	EUR 59 439 of which EUR 46 366 as fee, EUR 1 185 for expenses and EUR 11 888 as VAT.

5. Of the fees and costs as per 4. above Rual shall as between the patties bear EUR 112 992 and Viva shall bear EUR 112 992 and Viva shall reimburse Rual for such amount as Rual may demonstrate to have been taken from its deposit with the Institute in excess of what Rual shall bear as aforesaid, plus interest thereon, at a rate corresponding to the interest rate as semi-annually determined by the Bank of Sweden plus 8 percentage units, from this day until full payment has been made.

[241]. A party who is dissatisfied with this Award insofar as the dismissal for lack of jurisdiction is concerned may pursuant to Article 36 of the Swedish Arbitration Act bring an action to the Sea Court of Appeal within three months front receipt of this Award.