Zürich Chamber of Commerce
Arbitration Award ZHK 273/95 of 31 May 1996

A. Introduction

1. Aluminum Ore/Bauxite is found in various parts of the world. Some is imported into Russia, some is extracted locally.

2. Bauxite is refined to Aluminum Oxide/Alumina. Some is imported into Russia.

3. From Alumina, aluminum smelters extract Raw Aluminum (in ingots) through electrolysis, a process requiring large quantities of energy. [Seller] [a Russian firm] is such an aluminum smelter located in the coal-producing Kuzbass region of Southern Siberia.

4. Raw Aluminum is then cast into aluminum billets, rods, wire and other shapes. In the group of companies of [buyer] [an Argentine group] there were such aluminum casting works or rod mills in Argentina [in Sardinia and in Hungary.]

5. The aluminum billets, etc. are used by cable works and other manufacturers throughout the world.

6. [Seller] and [buyer] first came into contact in 1990.

7. From 1991 onwards various protocols and contracts were signed . . .

[. . .]

9. [Seller] also was to to supply raw aluminum to a newly formed Argentinian share corporation, of which [buyer] was the main shareholder, A__, which operated a new aluminum casting plant at Puerto Madryn. [Seller] became a 20 percent shareholder in that corporation. This will be further discussed in below, **N** and **O.**

10. A similar arrangement had originally been contemplated with respect to the plant operated by yet another company in the [buyer] group, A__ in Sardinia, but [buyer] chose to enter into this type of arrangements with another Russian aluminum smelter.

11. The supplies of raw aluminum were made through a company incorporated in Madeira, N__ belonging 95 percent to [seller]. However, no written contracts exist which would be back to back to contract 60-01, 60-02 and 60-47 and by which N__ would have sold on the raw aluminum to E__ or A__. This will be further discussed in below, **I, R** and **T.**

12. When [seller] was privatized in December 1994, [buyer], together with a Korean partner __ entered a bid, and (so [buyers] say and [seller] does not specifically deny) was the preferred candidate of the then management, but the business was acquired by its present owners. This will be further discussed in below, **M.**

13. [Seller's] new owners stopped all deliveries of raw aluminum to [buyer] from early February 1995 onwards, pending an internal investigation. The deliveries were never resumed. This will be further discussed in below, **M.**

14. The parties (and several individuals whose names appear in the file) are presently joined in bitter battle in various private and criminal law fora, including the present arbitral tribunal . . .

[. . .]

K. Applicable law(s)

141. In this international arbitration having its seat in Zürich, Art. 187 PIL Statute applies which reads as follows in translation:

> "The arbitral tribunal shall decide the case according to the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection.
>
> "The parties may authorize the arbitral tribunal to decide the case *ex aequo et bono."*

142. The parties did not choose the applicable law directly, but Art. 4 of the Zürich Rules reads as follows in translation:

> Art. 4 Applicable Substantive Law
>
> "The Arbitral Tribunal decides according to the substantive law declared applicable by the parties.
>
> "If the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the law applicable according to the rules of the Private International Law Statute.
>
> "If, however, the application of the PIL at the seat, domicile or habitual residence of all parties leads similarly to a different result, the case must be decided accordingly on motion of one of the parties."

143. This refers to Art. 116 to 118 PIL Statute which read as follows:

> Art. 116
>
> "Contracts are governed by the law chosen by the parties.
>
> "The choice of law must be explicit or clearly evident from the agreement or from the circumstances. Moreover, it is governed by the chosen law.
>
> "The choice of law can be made or altered at any time. If made or altered after the conclusion of the contract, it takes effect retroactively from the time of the conclusion of the contract. The rights of third parties are reserved."
>
> Art. 117
>
> "If no law has been chosen, a contract is governed by the law of the country most closely connected with it.
>
> "The closest connection is presumed to exist with the country where the party which must make the characteristic performance has its habitual residence, or, if the contract is based on a business activity, has its business establishment.

"The characteristic performance is, in particular:

(a) in contracts to pass title, the performance of the transferor;

(b) in contracts to grant the use of a thing or a right, the performance of the party that grants the use;

(c) in mandates, construction, and similar contracts for services, the service;

(d) in contracts for storage, the performance of the keeper;

(e) in guarantee and surety contracts, the performance of the guarantor or surety.

Art. 118

"For contracts to sell movable goods, the Hague Convention of 15 June 1955 on the Law Applicable to the International Sales of Goods applies."

Article 120 PIL Statute is excepted.

144. Art. 2 and 3(1) of the Hague Convention read as follows in the original French:

Art. 2

"La vente est régie par la loi interne du pays désigné par les parties contractantes.

"Cette désignation doit faire l'objet d'une clause expresse, ou résulter indubitablement des dispositions du contrat.

"Les conditions, relatives au consentement des parties quant à la loi déclarée applicable, sont déterminées par cette loi."

Art. 3(1)

"A défaut de loi déclarée applicable par les parties, dans les conditions prévues à l'article précédent, la vente est régie par la loi interne du pays où le vendeur a sa résidence habituelle au moment où il reçoit la loi interne du pays où est situé cet établissement."

Translation:

Art. 2

"A sale shall be governed by the internal law of the county designated by the contracting parties.

"Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract.

"Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law."

Art. 3(1)

> "Failing a law declared applicable by the parties under the conditions provided in the preceding article, a sale shall be governed by the internal law of the county in which the seller has his habitual residence at the time when he receives the order. If the order is received by an establishment of the seller, the sale shall be governed by the internal law of the country in which the establishment is located."

145. If one reads the above statutory texts it becomes clear that normally the whole contract is governed by one law. Only by way of exception would one split up the various elements in the contract and have different laws applicable to these different elements in the contract, what the French call dépeçage.

146. In order to apply *one law* one has to ask oneself what is the main thrust of the Protocols. The main thrust is long term supply of raw aluminum. There is an ancillary aspect (above, point 108), which is giving [seller] minority participation in E__ and A__, and some other ancillary obligations. Therefore the entire contract as a rule, is governed by the law of the vendor, that is *Russian law.*

147. In Russian law, the *United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention)* applies to the international sale of goods for contracts made on or after September 1, 1991. Raw aluminum is goods.

148. While it is true that Art. 6 of the Vienna Convention states that "the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions," the parties in this case did not exclude the application of the Vienna Convention nor did they *derogate* from or vary the effect of the provisions here relevant.

149. The Vienna Convention does not deal with the sale of participations such as parts in a company in Hungary or securities, such as shares in a company in Argentina (Art. 2(d) Vienna Convention). Neither does it deal with the question of fundamental error, mistake, fraud and other aspects of the making of the *contract* (Art. 4(a) and Art. 7(2) Vienna Convention). For these, *general Russian law* applies.

150. There is no good reason to operate a *dépeçage*. Then, some questions, particularly questions concerning the corporate *structure* of E__ and the sale of those parts and the corporate structure of A__ and the sale of those shares might be governed by a law different from *Russian law*.

151. This would lead to difficulty. There were different sellers of E__ shares. Some of these sellers are in Argentina, some are possibly in Italy, some perhaps in some other countries. So, should one apply *different laws* to these *various* sales of these component parts of the 15 percent? That would then really be *dépeçage* in the extreme.

152. Or should one try to find one unitary law to these sale of parts in the Hungarian company? The unitary law that one then obviously would apply would be *Hungarian law.*

153. Similarly, for the sale of the shares in A__, if one had to apply one law to some aspects and different laws to other aspects, it would again be the *laws of the various sellers* of the shares in A__ S.A.

154. Or then, one would apply just one law, and that would then be *Argentine law,* while all the supply obligations would be governed by *Russian law* (that is the Vienna Convention).

155. The Arbitral Tribunal finds it appropriate to apply Russian law to *all* aspects of the contractual relationship between the parties in order to protect the coherence of the contract.

156. Now, whether it all makes any difference is still another question. The laws of Russia, Hungary, Argentina are all laws within the civil law family. Theories of general mistake and fraud and similar theories exist in all these laws.

157. The Arbitral Tribunal however, need not discuss general law (that is the law apart from the Vienna Convention) any further because [seller's] allegation of fraud allegedly committed by [buyer] will turn out to be baseless no matter whether Russian or some other law applies.

L. Non-delivery by [seller]

158. Art. 30 Vienna Convention reads as follows:

> "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."

159. Art. 45(1) and (2) Vienna Convention read as follows:

> "(1) If the [seller] fails to perform any of his obligations under the contact or this Convention, the buyer may:
>
> > (a) exercise the rights provided in articles 46 and 52;
> >
> > (b) clam damages as provided in articles 74 and 77.
>
> "(2)The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies."

160. Art. 49[(1)] Vienna Convention reads as follows:

> "(1) The buyer may declare the contract avoided:
>
> > (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; o[r]
> >
> > (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed."

161. Art. 25 and 26 Vienna Convention read as follows:

> Art. 25
>
> "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."
>
> Art. 26
>
> "A declaration of avoidance of the contract is effective only if made by notice to the other party."

162. Art. 72 Vienna Convention reads as follows:

"(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

"(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

"(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations."

163. Art. 73 . . . Vienna Convention read[s] as follows:

"(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

"(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

"(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

164. Art. 81(1) Vienna Convention reads as follows:

"(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract."

165. The basic question in this arbitration is, is there a *fundamental breach* of the Protocols and the further agreements, and if so, by whom? It is undisputed that at the beginning of February 1995 [seller] deliberately stopped supplying tonnage to E__ and A__.

166. [Buyers] on the basis of an alleged fundamental breach by [seller] sue for specific performance of [seller's] obligations. Alternatively, [buyers] measure their damage by the failure to supply the agreed tonnages into the future. These are Claims 1, 2, 3a, and 3b.

167. [Seller] claims that [seller] was *justified* under the circumstances by a previous fundamental breach by [buyers]. This is [seller's] main defense.

168. For the Arbitral Tribunal it is clear that [seller's] deliberate stop of supplies to E__ and A__ was a fundamental breach by the seller under Art. 30 Vienna Convention, namely an anticipatory repudiation of an installment contract under Arts. 49, 72 and 73 Vienna Convention, *unless* it *was* justified under the circumstances as [seller] claims.

169. *If* the seller was in fundamental breach, the buyer was not required to set the seller a further deadline for deliveries. The buyer could declare the contract avoided in respect of the overdue and of future deliveries.

170. This is what [buyers] did in this case. Less than two months later, which the Arbitral Tribunal deems a reasonable time under the circumstances involving an installment contract for deliveries over a period of still another seven or eight years, [buyers] commenced arbitration against [seller].

171. The claim was for specific performance, alternatively for damages. One of the principles of the Vienna Convention is that the aggrieved party is not required to make an election of remedies and is not prevented from claiming damages if it has claimed performance (Art. 45(1) Vienna Convention; compare Art. 61(2) Vienna Convention). In the present case, performance was claimed only as an alternative. Since, for reasons that the Arbitral Tribunal will explain below, point **Q,** the claim for specific performance must be denied, the alternative claim for damages must be understood to be a declaration of avoidance which was timely made. Hence, the effects of Art. 81(1) Vienna Convention come into play, and damages become due (see below, point **R**).

172. All this is, however, on the assumption that [buyers] were not in fundamental breach *themselves,* in which case seller would, under Art. 81 Vienna Convention just cited, be *excused* from performance. The Arbitral Tribunal now turns to the various defenses that [seller] presents (below; points **M, N,** and **O**).

M. [Seller's] defenses - non-payment by [buyer]

(a) Facts

173. The various contracts for deliveries of raw aluminum from 1991 onwards have already been mentioned, and their performance did not lead to substantial problems until 1995.

174. The events that led up to the present dispute were as follows:

175. In December, 1994, or early in January, 1995, Mr A. met Mr. Z. Mr. Z told him that [seller] and its new owners would not supply a single kilogram of raw aluminum to [buyer's] group. This allegation was not denied by [seller]. It was confirmed by Mr. A's testimony on April 4, 1996. Mr. Z announced exactly what subsequently happened: [seller] stopped supplying.

176. On January 5, 1995. Mr. K sent the following telex to [buyer]:

> "On 05.01.95 your approximate debt on ctr. 60-2 is USD (illegible) please transfer as soon as possible the above mentioned sum to our account."

177. On January 13, 1995, Mr. A sent the following telex to Mr. K.

> "Until now we have not received any reply to our telex no. 7375 of 3rd January 1995 indicating the quantities and qualities of metal to be sent by you to Hungary during February 1995.
>
> "We would like to remind you of your binding contractual commitment concerting this transactional agreement no. 60/47 signed by both parties for the supply of 30.000 mt. of aluminum to Hungary.

"Please advise by return when shipments to [Hungary] will start, as well as tonnages and grades.

"We need this information urgently for the production planning at E__, we would suffer substantial prejudices if the metal were not to arrive in time.

"We would also like to remind you the following issues:

- your debit towards A__

- new investments at A__

"In addition, as you know, you have other pending commitments with us which date from 1993 and 1994.

"In order to discuss above, we suggest a meeting with you in Hungary over the next few weeks.

"Please suggest a date or dates by return."

178. On January 19, 1995, Mr. K sent the following telex:
"According to the preliminary calculations the debts of N__ to [seller] is US $ 6,060,000.00 on the 16 [October] 1995 [1994]. I ask for you to pay this sum urgent on our account."

179. On January 20, 1995, Mr. K sent the following telex to Mr.__:
"In reply for your telex of 1995.01.13 no. 7430 I report you such information: the extraordinary meeting of joint stock [N__Company] have taken place on January, 20th. The new staff of the directors council was elected. My authorities as general director are confirmed. The new staff of the directors council have taken a decision to examine all contracts and agreements and do not carry out them without the directors council approval.

"The contract no. h 008343672/40300-05 with [T__] company have been prepared instead of the contract no. 60-47. The new staff of the directors council have confirmed the possibility of aluminum providing for E__ on account of the metal from [T__Company's] commodities, but the council have demanded to present urgently the balances and reports about the works of E__ during 1992, 1993 and the decisions of the shareholders according to the annual results of the work. I consider that it is necessary to send these documents as fast as possible and to inform us when the results of the 1994 will become known. In addition we will agree the meeting in Hungary for decision all these questions jointly with the representatives of the companies and the directors council. As it was mentioned earlier the payments in A__ have not been made, that is why the plant have not got yet the license of the Central Bank of Russian Federal for transferring the capital from Russian Federation. Then it will be necessary to have the decision of the directors council to carry out the investments for A__.

180. Mr. K testified that he remembered sending the above telexes.

181. On January 26, 1995, Mr. K apparently wrote this to Dr. B:

"The date of my arrival to [Hungary] is yet unknown to me because of the M__ company did not agree this question. The aluminum delivery for [buyer] have to be agreed with [T__] Company or you have to apply to Mr. L."

[Note: Seller, however, emphasises that [T__ Company] is not presently a shareholder of seller . . .]

182. Mr. K could not remember having sent the January 26, 1995, telex, and when asked whether it was thinkable that his name might have been used by somebody else to send a telex he did not provide an answer.

183. On January 27, 1995, Mr. K wrote this to Dr. B:

"It is a pity but it is impossible for me to take part in the meeting in [Hungary] and in Milano from 27th up to 29th of January. We have no possibility to determine the date of the mutual discussing of the questions. It is necessary to agree the date with the directors council. Apply to the contract on 30,000 tons for 1995, we have reported to you that after our final meeting with shareholders on the 20th of January the directors council only has the right to realize the actual contracts and to sign the new one. On this reason the authorities of the plant must discuss these problems with the directors council.

"Additionally the Ministry of Economics and the Ministry of Foreign Economical Relations have not decided the question of the quota 60,000 tons for the purposes of the plant reconstruction. We are taking measures that it will possible to provide E__ by metal deliveries. Most probably it will not be the direct contract with [seller] is probably that our meeting will take place in the second ten-day period of February. The place of the meeting and the date will be agreed additionally."

(b) Arbitral Tribunal's opinion

184. Art. 53 Vienna Convention reads as follows:

"The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."

185. Articles 61 to 64 of the Vienna Convention read as follows:

Art. 61

"(1) If the buyer fails to pay any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

"(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

"(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

Art. 62

"The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with [t]his requirement."

Art. 63

"(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

"(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance[]."

Art. 64

"(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

"(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time: (i) after the seller knew or ought to have known of the breach; or (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period."

186. Art. 71 Vienna Convention reads as follows:

"(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, 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

"(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them.

The present paragraph relates only to the rights in the goods as between the buyer and the seller.

"(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."

187. Art. 80 Vienna Convention reads as follows:
Art. 80

"A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."

188. [Seller's] defense is that [buyers] were in fundamental breach of their obligation because they had not finished paying for the goods delivered under Contract 60-2.

189. The Arbitral Tribunal disagrees. The Arbitral Tribunal does accept that the various yearly Contracts 60-1, 60-2, 60-47 and those that would have followed (or rather, the contracts between N__ and [buyer] which would have been back to back to all these contracts, see chart on page 40) must be considered, for the purposes of the Vienna Convention, to be one large installment contract in the sense of Art. 73 Vienna Convention as foreseen under the Protocols.

190. However, the failure by a buyer to perform one installment (i.e., paying the price for one installment) gives the seller the right to avoid the contract only where the buyer's breach is a *fundamental* breach (Art. 73(2) Vienna Convention). The Arbitral Tribunal has no indication that [buyers] were unable or unwilling to meet their payment obligations under the various contracts (Art. 71(1)(a) Vienna Convention, see also Art. 78 Vienna Convention), let alone had committed an anticipatory repudiation of these contracts (Art. 72 Vienna Convention).

191. In such a situation, moreover, the seller must set the buyer an additional deadline as provided in Art. 64(1)(b) Vienna Convention. This [seller] did not do.

192. In fact, even [seller's] original demands for payment of January 5, 13, and 19, 1995 were unclear since [seller] asked for the payment of US $6,060,000, a sum according to their own words an "approximate debt" based on "preliminary calculations."

193. In March and June 1994, [buyers] had settled their debts after having sorted out all discrepancies with [seller]. When in January 1995 they asked repeatedly for a meeting to discuss various points in connection with the approximate debt claimed by [seller], this was denied by [seller] all of a sudden. This was inconsistent with the previous course of dealing between the parties in the sense of Art. 8(3) Vienna Convention.

194. The Arbitral Tribunal further considers that the following action, attributable to [seller], caused in the sense of Art. 80 Vienna Convention [buyer] to withhold payments: Mr. Z in advance informed Mr. A that the [buyer] would not receive any more aluminum from [seller]. One could call this an anticipation of an anticipatory breach. Under such circumstances no reasonable business person would pay.

195. [Seller] attempts to say that it did not stop deliveries because in its telex of January 20, 1995 (above, point 179) it suggested to [buyer] that they could purchase the aluminum from somewhere else ([T__ Company]) [see, above, point 181] and that [seller] might even help them

to do that. This is without merit. The only way to discharge an obligation to deliver aluminum is to deliver aluminum, not words.

196. Accordingly, the Arbitral Tribunal can only disagree with [seller] if it now claims that it was justified in interrupting its supplies of raw aluminum to [buyers] and never resuming its supplies because [buyers] had failed to pay the earlier shipments. This defense is *rejected.*

[. . .]

Q. [Buyers'] request for specific performance

347. Now the Arbitral Tribunal comes to the *remedies* that are claimed.

348. The Arbitral Tribunal believes that this is primarily a question of the applicable law. It sees no basis for claims for *specific performance* under Russian law. The Vienna Convention does not provide for this. If the law applicable to the procedure (Swiss law? - again the Vienna Convention) applied, the Arbitral Tribunal sees no basis for specific performance either.

349. Apart from that the Arbitral Tribunal fails to see how specific performance could be an appropriate remedy for [buyers] in this case. They can hardly expect to be able, under the New York Convention or otherwise, to have an award enforced in Russia providing that [seller] must specifically perform its obligations under the various contracts for the next eight or ten years, producing the aluminum and delivering it to [buyers].

350. The Arbitral Tribunal will accordingly grant [buyers'] "alternative" request for relief in the form of damages.

R. Quantum of [buyers'] damages (Claims 1, 2, 3a, 3b, 7 and 8)

How many tons per year?

351. The Arbitral Tribunal already answered the question *an debeatur* for Claims 1, 2, 3a and 3b. The Arbitral Tribunal now turns to the *Quantum* of these claims.

352. Which annual quantities were agreed between the parties? With respect to the E__ Framework Agreement, there is no dispute. The agreed minimum quantity "per year" was 15,000 metric tons.

353. Under the A__ Framework Agreement, the situation is more difficult: [Buyers] maintain that Art. 6 of the A__ Framework Agreement of July 3, 1993, between [seller] and G__ must be read as saying "within the next 10 years at least 15,000 metric tons of aluminum ingots *"per year"* (words in italics added)".

354. [Seller] maintains that the mentioned clause was agreed as written (without "per year").

355. The *Arbitral Tribunal* finds that Mr. K__'s testimony is believable that [seller] had no export contracts for less than 30,000 t per year. A contract to supply just 15,000 t at any time over a period of 10 years makes no commercial sense. This was also explicitly confirmed by [buyer's] expert witness, Mr. RK, who was entirely convincing on this point (Tape 2/9 of 2 April 1996, at Pt. 29.3). The annual capacity at E__ was about 15,000 t, and so was the capacity at A__. The A__ Framework Agreement foresees 15,000 t "*por* los proximos diez años"

(Emphasis supplied) at a price to be agreed "*cada* trex meses". The participation taken out in A__ also suggests that the agreement of the parties was 30,000 t *per year* altogether. Furthermore, the agreed quantities in Contracts 60-2 for 1994 (originally 60,000 t) and 60-47 for 1995 (30,000 t) suggest that *at least* 30,000 t was the annual supply intended by the parties.

356. Thus, the Arbitral Tribunal finds the position of [buyers] convincing that one must read in the words, *"per year"*. Under both, the E__ and the A__ Framework Agreements taken together, the long term commitment of [seller] was to deliver 30,000 tons annually and not only 16,500 tons.*

* To be sure, while it makes economic sense to ship raw aluminum from Southern Siberia to Hungary, it would be uneconomical to supply raw aluminum physically half around the world from Southern Siberia to Southern Argentina, and to a rod mill adjacent to a smelter. The Arbitral Tribunal understands, however, that tonnages of raw aluminum are regularly swapped.

Individual Claims reviewed

Claim 1

357. According to the [buyers], [seller] failed to deliver 768 tons of metal under Contract 60-2 providing for the delivery of 60,000 tons during 1994. 768 tons is less that what seems admitted by [seller]. According to [seller], 59,139.955 tons were delivered under Contract 60-2 (see Additional Answer of NKAP, submitted to the Arbitration Tribunal on February 26, 1996, page 7, para. 3), leaving 860 tons undelivered.

358. [Buyer] provided certain evidence for an onward sale of the 768 tons which could not be realized due to [seller's] failure to deliver (Exh. 1 to [buyers'] Supplemental Statement of Rebuttal of March 11, 1996). Thus, the damage calculation in Exh. 2 to [buyers'] Supplemental Statement of Rebuttal of March 11, 1996, showing a lost profit of US $95,291 from the incomplete transaction, seems convincing.

359. Likewise, the alleged amount of dead freight (US $30,703.56) and the damages paid to the third party buyer (US $76,758.90) is evidenced by Exh. 28 of [buyers'] Statement of Claim of April 24, 1995 and Exh. 1 of [buyers'] Supplemental Statement of Rebuttal of March 11, 1996. The Arbitral Tribunal accepts that the dead freight ultimately was to be borne by [buyers] and thus is part of its damage.

360. Claim 1 accordingly is upheld by the Arbitral Tribunal in an amount totalling US $202,753.46.

Claim 2

361. As set forth in [buyers'] Statement of Rebuttal of February 26, 1996 (pages 1 and 4), Claim 2 has been integrated into Claims 3(a) and 3(b) for replacement supply over the remaining term of [seller's] 10 years obligations. No separate claim for 1995 replacement supplies, therefore, needs to be addressed by this Arbitral Tribunal (see [buyers'] Supplemental Statement of Rebuttal of March 11, 1996, pages 2/3).

Claims 3(a) and 3(b)

362. Art. 74 Vienna Convention reads as follows:

> "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

363. An unjustified unilateral cancellation of a long term supply relationship by an aluminum producer may create substantial damage to its customer (the aluminum processor) who relied on this continuing source of supply. The testimonies of Messrs. RK (a Vice-Chairman of the London Metal Exchange) and WB (of M__) are convincing in this respect. As regards the quantum of claims 3(a) and 3(b), the question of measuring the damages is difficult and necessarily subjective, due to the need to project future earnings.

364. Mr. RK's testimony and his damage calculations relied (among other assumptions) on the assumption that the prices agreed between [seller] and ____ (a company belonging 95 percent to [seller], which he did not know), in particular under Contract 60-2 of November 29, 1993, were the same prices as those that the [buyers] had to pay to [seller]. Under this assumption, Mr. RK arrived at the conclusion that the *preferential pricing margin* of the [buyers] under the Framework Agreements amounted to an average of US $147.89 per ton (in the case of E___), and US $146.17 per ton (in the case of A___). He furthermore determined that the actual incremental cost to the [buyers] for the procurement of replacement supplies of aluminum in 1995 was US $144.17 per ton. Using an average of US $146.-- per ton for all his damage calculations, Mr. RK arrived at a total gross loss of [buyers] of US $35,040,000 for the "remaining contract period", which he assumed to be eight years in both cases, corresponding to a present value of US $26,656,525 (RK opinion, see particularly pages 9, 12 and Exh. 2).

365. Mr. WB concluded in his expert opinion that, in addition to the above, there was *additional financing and stocking cost* due to the requirement to increase stock under the uncertain supply environment (WB opinion, see pages 5-9).

366. On the basis of the RK opinion, [buyers] calculated their damages (Annex 2 presented with RK opinion) for the entire remaining eight-year term at a total of US $26,656,525 (loss of preferential pricing present value). On the basis of Mr. WB's opinion, there is an additional damage of US $1,539,767 (added financing costs due to extra stocking -- present value).

367. [Seller] did not present a calculation of the quantum of its own. It limited its attack on the calculation presented by [buyers] by means of its party-appointed experts, Messrs. RK and WB, to two points:

368. [Seller's] first point was that the party-appointed experts were both just that and not tribunal-appointed experts.

369. The Arbitral Tribunal agrees. Still, an arbitral tribunal may rely on a presentation by a party-appointed expert, particularly if it was not challenged on its merits, if it considers the information provided credible and reliable, and it need not, in such a case, appoint a tribunal-appointed expert of its own.

370. In the instant case the Arbitral Tribunal finds the information provided by [buyers'] party-appointed experts to be indeed generally credible and reliable.

371. [Seller's] second point was that Mr. RK's report was rendered, as Mr. RK readily admitted on cross-questioning, on the assumption that ___ was a company in the [buyers'] group. [Seller] pointed out, and the Arbitral Tribunal accepts, that this assumption is incorrect. ____ belongs to 95 percent to [seller]. The effect of this will be further discussed below at point 388.

372. Even though [seller] did not challenge the damage calculation by [buyers] in any other respect, according to Art. 44 Zürich Rules, the Arbitral Tribunal assesses the evidence freely. The Arbitral Tribunal may, and does in this case, bring in further considerations that lead it to calculate the damage differently. The further considerations of the Arbitral Tribunal makes are the following:

373. The Arbitral Tribunal notes that the parties agreed on competitive world market prices. This will be further discussed below at point 378.

374. The duration of the B___ Framework Agreement and the A___ Framework Agreement was not, as Mr. Kestenbaum assumed, eight years. This will be taken up first.

(i) RK Assumption: Eight Years

375. In the Arbitral Tribunal's opinion, it is not correct to assume that the damage period under both Framework Agreements is "eight years" (Statement of Rebuttal of February 26, 1996, page 12). The E___ Framework agreement was concluded on July 6, 1992 for the "next ten years". It thus would have come to an end on July 5, 2002. The A___ Framework Agreement, which was also concluded for "the next ten years", was signed on July 3, 1993, i.e., one year later. It thus would have come to an end *one year later,* namely on July 2, 2003. Because both Framework Agreements were no longer performed by [seller] as of February, 1995, this leaves respective remaining periods of *seven and a half* years under the B___ Framework Agreement and *eight and a half years* under the A___ Framework Agreement.

376. Thus, the calculated principal and interest deductions for B___ would correctly have to stop two quarters earlier than specified in exhibit 2 of the RK Opinion (namely after seven and a half years), while the calculated principal and interest deductions for A___ would correctly have to be extended by two more quarters (namely to eight and a half years).

377. However, in this respect, the following is to be taken into account: As to the principal, the calculation errors of the missing half year and the excess half year balance each other out. As to the interest, the discounted amounts (based on 30,000 tons) in the last six months of year seven, will exceed the discounted amount (based on 15,000 tons) in the first six months of year eight. Thus, the calculation error on interest works against [buyers] themselves. The Arbitral Tribunal will disregard this comparatively insignificant error.

(ii) RK Assumption: Continued delivery at preferential price level

378. In the Arbitral Tribunal's opinion, it is similarly unlikely and ought not "have been foreseen" (Art. 74 Vienna Convention) by [seller] at the time of conclusion of the contract that delivery below world market prices (the discounts) which [seller] obviously was granting to [buyers] in the past would be upheld throughout the "remaining contract period". In fact, this assumption -- quite sharply -- contradicts the explicit wording of both Framework Agreements which state that "[Seller] agrees to deliver at the *competitive world market price"* (emphasis supplied). The framework Agreements further state that the *world market price* should be "agreed upon" or "fixed" by the parties "every three months" (Art. 5 E___ Agreement), i.e.,

"quarterly" (Art. 6 A___ Agreement). In other words, the Framework Agreements, on which Claims 3(a) and 3(b) are based, *did not provide for or guarantee preferential prices, nor did they foresee discounts,* over the whole Framework Agreement period. Just to the contrary, the E___ and A___ Framework Agreements provided that prices should be *competitive* and at *world market levels,* and they must be *negotiated quarterly.* In other words, they are *adjustable* as to any new supply contract.

379. Under these circumstances, one cannot simply assume, as Mr. RK and [buyers] do, that [seller's] preferential seller prices to [buyers] would always remain below world market price levels as established with reference to the London Metal Exchange prices.

380. Here again, the question of how long the preferential seller prices (which in the past were indeed granted), would have been maintained in the future is for the Arbitral Tribunal to assess.

381. In this connection, it is important to keep in mind that the ownership and directorate of [seller] had changed shortly before the Framework Agreements and all other contracts between the parties had been repudiated by [seller]. According to the submissions of both parties -- reconfirmed by Mr. K__'s testimony -- the new owners and the new directorate of [seller] were suspicious that [seller's] Western partners in the joint venture were making undue profits to the detriment of [seller]. Thus, it may safely be assumed that the new owners and the new directorate of [seller] would have requested [seller's] management (sooner rather than later) to raise their export prices to the agreed "competitive world market" level during the next or following price negotiation rounds. Such price negotiation rounds simply had not occurred because [seller] (erroneously) believed that it was entitled to an outright cancellation of the Agreements with [buyers].

382. Mr. RK in his report distinguished *two elements* which made up the profit that [buyers] were able to make on the basis of the preferential purchase conditions that they had been granted in the past supply contracts.

383. A first element of [buyers'] damage resulted from [buyers'] loss of what Mr. RK called an *option*, namely the right to fix the quotation period, an option that [buyers] obviously would exercise in their own interest. Mr. RK put a figure of US $50.-- *per ton* to this option.

384. The Arbitral Tribunal can follow this reasoning on the option and considers this to be indeed part of the damage to be awarded to [buyers].

385. A second element results from a comparison of the prices that [buyers] had to pay and those that they were able to receive in the world market. To be sure, the world market price cannot be simply taken to be the LME price, and this was taken into account by Mr. RK. He made the necessary adjustments to reflect transportation and other costs free Hungarian border.

386. The Arbitral Tribunal cannot believe that the difference between the preferential purchase price for [buyers] for delivery free Hungarian border and the world market selling price for delivery there, would have remained as large as in the past contracts over the remaining contract period.

387. Consequently, the Arbitral Tribunal deems it proper to reduce the damage due to loss of preferential pricing.

(iii) RK assumption: No trading profit of [seller]

388. In the Arbitral Tribunal's opinion, it seems very unlikely and ought not to "have been foreseen" (Art. 74 Vienna Convention) by [seller] at the time of conclusion of the contract that [seller] would always grant its purchase price back-to-back to [buyers] throughout the entire remaining contract period. Rather, it is likely and justified to assume that the back-to-back resale price of [seller] to [buyers] would be increased gradually in the future, taken both parties' statements in this arbitration that [seller] was created to accumulate hard currency trading profit outside of Russia. If [seller] wanted to make such hard currency trading profit in the future, this inevitably would have eroded [buyers'] "preferential pricing margin" and thus Mr. RK's damage calculation seems to favor [buyers].

389. The question how much a reasonable trading profit of [seller] would be, is for the Arbitral Tribunal to assess. In this connection the Arbitral Tribunal notes that the [seller's] Management Agreement provided:

> "Los gastos y las utilidades de [seller's] Aluminium Trading a partir del 1994 no excederan de un 2% del monto de las operaciones."

Translation:

> "The costs and the dividends of [seller's] Aluminium Trading from 1994 onwards shall not exceed 2% of the transactions."

390. In the long run, [seller] thus would have had to be put into a position to make a profit in order to fund its own expenses and taxes. The entire operation would not have seemed reasonable if [seller] was not going to be put into a position to make a minimum profit.

(iv) Arbitral Tribunal's decision on damages assessed by Mr. RK

391. Based on the foregoing, the Arbitral Tribunal accepts that the damage to [buyers] due to the loss of the option mentioned in Mr. RK's opinion (see above, point . . .) is US $50.-- per ton. For 30,000 tons during eight years this amounts to US $12,000,000 which are herewith awarded.

392. For the remaining damage, assessed by [buyers] on the basis of the RK opinion at US $14,626,525 (US $26,626,525 minus US $12,000,000), the Arbitral Tribunal takes into account the two factors that Mr. RK did not consider, namely, on the one hand, the fact that the contract prices were originally set below world market prices, but would most likely not have remained so, and, on the other hand, that [seller] was apparently to receive 2 percent of its transaction as a commission, which foreseeably would have been charged to [buyers] for part if not all. Taking these two factors into consideration, the Arbitral Tribunal deems it proper to award damages of US $[5,850,610], that is, 40 percent of the figure determined by Mr. RK.

393. In sum, the Arbitral Tribunal awards US $17,850,610.

(v) Additional financing and stocking cost (WB Opinion)

394. In addition to the above damage calculated by Mr. RK, Mr. WB concluded in his expert report that there will be additional financing and stocking costs incurred by [buyers] due to the uncertain and "complex" supply environment that was created due to [seller's] repudiation of the agreements (WB opinion, see pages 5-9).

395. Mr. WB's testimony was not challenged by [seller] as being incorrect as such and the reasoning and the calculations of Mr. WB appear plausible to the Arbitral Tribunal.

Accordingly, the Arbitral Tribunal accepts that the additional financing and stocking costs determined in Mr. WB's opinion are realistic.

396. This leads it to award further damages to [buyers] of US $1,539,767.

397. The total sum awarded under Claim 3 is US $19,390,377.

Claim 7

398. For Claim 7 it is the burden of proof of [buyers] to show that "some 24 railroad cars of what was supposed to have been A7E grade aluminum were discovered to have a silicon content greater than 0.10 percent" (see Supplemental Statement of Rebuttal of [buyers], dated March 11, 1996, at page 3). The [buyers] presented to the Arbitral Tribunal the notice required by Art. 39 of the Vienna Convention (Exhibit 4 to Supplemental Statement of Rebuttal) as well as a test report by METALKO KFT, an independent test laboratory, reflecting (SI) contents higher than 0.10 percent in those shipments.

399. [Seller's] statement that "[Buyers] have not presented to the court any documents confirming the validity of their claim for the quality of aluminum delivered" (Additional Answer of [seller] submitted to the Arbitral Tribunal on February 26, 1996) thus appears to be incorrect.

400. According to contract 60-2 which was controlling the supply relationship between the parties in 1994, grade A6 aluminum was to be priced at a discount of US $60.-- per ton, whereas the discount for grade A7 aluminum was US $25 per ton (see Art. 7.4 Contract 60-2).

401. Accordingly, the claimed US $35 price difference, multiplied with 1,424.96 metric tons (this tonnage seems to be not contested by [seller]), finds support in the documents submitted to the Arbitral Tribunal and the corresponding amount due and awarded to [buyers] is US $49,873.--.

Claim 8

402. As to claim 8, the situation is different. Under this claim, [buyers] seek damages "for shortweights on metal deliveries" but fail to submit a copy of the notice required by Art. 39 Vienna Convention. In addition, [buyers] support their claim with internal recapitulations (Exhibits 7 and 8 to Supplemental Statement of Rebuttal) which allegedly are supported by Russian and Hungarian language documents that the Arbitral Tribunal is unable to read and/or understand (Attachments to Exhibit 8. Supplemental Statement of Rebuttal).

403. Likewise, and in opposition of this claim, [seller] produced a Protocol N.3 (in Russian) whose English translation seems to confirm that the differences in weight may have their cause in a difference between the weighing methods used by [seller] and the Hungarian railways (see Exhibit 6 of [seller's] Additional Answer submitted on February 26, 1996).

404. Consequently, [buyers] have failed to fulfill their burden of proof with respect to *claim 8* and this claim is *denied.*

405. *To sum up, the Arbitral Tribunal awards:*

Claim 1	US $ 202,753
Claim 2 integrated in Claim 3	
Claim 3.	19,390,377
Claim 4 withdrawn	
Claim 5 withdrawn	
Claim 6 withdrawn	
Claim 7	49,873
Claim 8 denied	
Total.	US $ 19,643,003

406. For the avoidance of doubt the Arbitral Tribunal would like to add the following:

For the above sum and all other sums awarded are payable to either E___ or S___, and payment to one of the two discharges the obligation to pay to either of them. Or more simply: [seller] must pay, but only once.