IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 122

Suit 266/1992

Between

Magenta Resources (S) Pte Ltd

… Plaintiff

And

China Resources (S) Pte Ltd

… Defendant

GROUNDS OF DECISION

Contract — Discharge; Credit and Security — Performance bond

Version No 1: 29 Oct 2026 (23:45 hrs)

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Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd

[1996] SGHC 122

Suit 266/1992
S Rajendran J
14 June 1996

1 Cur Adv Vult

2 Magenta Resources (S) Pte Ltd (plaintiffs) entered into a contract on 12 October 1991 to supply 50,000 metric tons of `prilled urea of USSR origin` c & f China to China Resources (S) Pte Ltd (defendants), then known as Intraco Resources Pte Ltd. On the same day the plaintiffs entered into a back-to-back contract with their suppliers International Business Development Center (IBDC) in Switzerland for the supply of the said urea whilst the defendants entered into a contract with Sintra Merchants Pte Ltd (Sintra) to supply the said 50,000 metric tons of prilled urea to China. The first shipment of 25,000 metric tons was to be made within 45 days of receipt of a workable letter of credit (LC) and thereafter deliveries were to be made at intervals of 30 days of receipt of workable LC.

3 Pursuant to the contract, the defendants opened an LC in favour of the plaintiffs on 21 October 1991. The LC was valid until 26 December 1991 and stipulated that the first shipment of 25,000 metric tons was to be effected not later than 30 November 1991. Clause 7 of the contract provided that if the

defendants wished to have any special markings on the bags of urea they were to provide the markings 45 days before the shipment. The defendants wanted special markings to be made and sent the stencils for the markings to the plaintiffs on 28 October 1991. The plaintiffs forwarded the stencils to their suppliers by courier. Mr Roger Eu (Eu), the managing director of the plaintiffs, estimated that it would have taken about five to seven days for the stencils to reach their ultimate destination. In view of the late provision of the stencils for the markings, the plaintiffs requested that the latest shipment date in the LC be amended to read 14 December 1991. This and other necessary amendments to the LC were agreed and an amendment to the LC was issued on 28 October 1991. The expiry date of this amended LC was 9 January 1992.

4 Clause 16 of the contract required the plaintiffs to arrange for their bankers to provide the defendants` bankers, on receipt of a workable LC, a performance bond for an amount equivalent to 2% of the LC value. On 29 October 1991, the defendants notified the plaintiffs that if the performance bond was not submitted by that day there was a strong possibility that their buyer would cancel its contract in which event the plaintiffs would be held liable.

5 On 31 October 1991, Banque Francaise du Commerce Exterieur (`BFCE`), the plaintiffs` bankers, provided the required performance bond to the Development Bank of Singapore, the defendants` bankers, by way of a standby LC in favour of the defendants in the sum of US$95,150. On 1 November 1991, the defendants telexed the plaintiffs to say that as the plaintiffs had failed to submit the performance bond on 29 October 1991 and as their buyers in China had cancelled the contract with them they were cancelling the contract with the plaintiffs with immediate effect.

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6 On receipt of the above telex, Eu immediately got in touch with Mr Sam Chong Keen (Sam), the managing director of the defendants. Sam explained to Eu that he had to cancel the contract because his Chinese partner, because of the falling price of urea, had cancelled the contract with him and asked Eu for assistance in cancelling the contract. Eu told Sam that so long as he was not out of pocket and it would not jeopardise his position with his suppliers he would try to assist. Eu then sent a telex to the defendants rejecting the purported cancellation. In the telex he pointed out that cl 16 of the contract required the plaintiffs to provide the performance bond on receipt of a workable LC and that the plaintiffs had done so within a reasonable time after receipt of the workable LC on 28 October 1991. The telex then went on to say that if the defendants wished to cancel the contract for other reasons the plaintiffs would get in touch with their suppliers and revert. It was Eu`s evidence that he, thereafter, spoke to his suppliers and the defendants and tried to arrange for a cancellation of the contract on mutually acceptable terms but nothing fruitful came out of these discussions.

7 On 15 November 1991, the defendants, by telex, again informed the plaintiffs that their buyers had cancelled their contract with them and they therefore had no choice but to cancel their contract with the plaintiffs. The plaintiffs replied that they will try and cancel their contract with their suppliers but will hold the defendants responsible for all losses arising from the cancellation. On 18 November 1991, the plaintiffs informed the defendants that agreement could not be reached on the cancellation. A meeting was then held at the defendants` offices on 19 November 1991 and by telex dated the same day the defendants asked the plaintiffs to go ahead with the shipping marks.

8 Eu testified that the disruption caused by the defendants` abortive attempts to cancel the contract resulted in the suppliers holding back on getting

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the cargo ready for shipment. He explained that 25,000 metric tons of urea would be packed in approximately 500,000 bags. Just to mark such a large quantity of bags would require considerable labour and time and no prudent supplier would like to be stuck with so many pre-marked bags in the event the contract was cancelled. He said that when the defendants` tried to cancel the contract on 1 November 1991 the suppliers would not have received the stencils yet but even when they did, in view of the negotiations on cancellation, it would be understood that the suppliers would delay work on the contract.

9 By telex dated 22 November 1991, the plaintiffs informed the defendants that the suppliers, when told to proceed with the shipping marks, had demanded an extension of the latest shipment date (which by the terms of the LC was 14 December 1991) by eight days to 22 December 1991. The defendants refused this request on the grounds that the plaintiffs` suppliers had all along maintained that they would ship the cargo. The plaintiffs`, by their telex of 27 November 1991, regretted the defendants` refusal to extend the shipment date and informed the defendants that they would try to have the urea shipped on or before 14 December 1991, failing which they trusted the defendants would accept a reasonable delay as the delay was directly attributable to the defendants` instructions to the plaintiffs to try and cancel their contract. No evidence was led of there being any response to this telex from the defendants.

10 On 2 December 1991 the plaintiffs informed the defendants by letter that they had received news that all discussions/negotiations regarding the shipment had to be halted for the moment. The letter went on to say:

> *The USSR was undergoing political changes right now and we understand that the entire country is awaiting the results from the referendum to be held last Sunday by Boris Yeltsin as to the future between Russia and the Ukraine. No one is functioning or willing to comment right now, or at least until after*

> *Tuesday/Wednesday Russian time, when some election news should be out. We regret the delay and will contact you as soon as we received any news.*

11 On 11 December 1991, the plaintiffs, based on information from their suppliers, sent a telex to the defendants advising that loading will commence on 17 December 1991 at the port of Novorossisk and that the estimated sailing date was 25 December 1991. The telex however ended on the following cautionary note:

> *We would like to draw your attention on the delay which is due to circumstances beyond our control, ie force majeure in Russia. As a result of the political changes, there is confusion and uncertainty. There are also new requirements on documentation, procedures and permits are also necessary at local authority. At the same time your attempt to cancel the contract for which we try to assist but subsequently found it impossible. This have also halted the progress of the shipment.*

12 It may be noted that on 9 December 1991 the Union of the Soviet Socialist Republic (USSR) formally ceased to exist as a political entity.

13 Eu testified that during that period he was constantly in touch over the telephone with his suppliers. On 12 December 1991, he received a fax from them that:

> *The various Republics are initiating their own regulations and laws, therefore we have had to renegotiate transportation and other logistical points. As of now all such changes are being made with maximum efficiency and success. The shipment will be made according to our agreement with the exception of the delivery date. This date must be amended under the force majeure clause.*

14 As the suppliers had asked for an extension of time under the force majeure clause, Eu felt that he, in turn, ought to invoke the force majeure clause against the defendants. Accordingly, on 13 December 1991, he gave the following notice to the defendants:

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> *Our supplier has just cfn tt due to d recent n continuing political upheavals in d USSR, leading to d decentralization of local authorities n formation independent republics, d said urea cld not be transported n exported as originally planned under d previous licences(s) n permit(s) ie in early Dec. D previously issued licence/permits for d urea apparently were no longer recognised or accepted at face value by d various local authorities, who required new licence/permits to replace or amend/validate d old licence(s) n permits(s). This caused immense transportation problem n has resulted in d port of loading to b changed more than once n there4 exceeding diff to cfn d vessel. Tremendous communicatn problems in n out of USSR was also compounded d delay.*
>
> *D upheavals n changes in licence/permits stopped n delay all trptn n shpt arrgmts tt had been for early Dec 91 which had d effect of halting ou urea shpmt. We hv bn assured by our supplier tt they r sparing no efforts including expense to fulfil d contr obligations.*
>
> *We there4 gv u notice under cl 17 of our contr n declare `force majeure`. As of this dd, all terms of abv contr hv been fulfilled by us except d shpmt dd, which we expect wl b on or b43 Jan 1992.*
>
> *We wld appr yr full cooperation in view of d unforeseen problems indicated abv n wld b obliged if y wld kindly amend d L/C adddly.*

15 Eu testified that during that period, both before and after he gave notice of force majeure, he had, in conversation with Sam and in conversation with one AL Sim, the officer in the defendant company directly in charge of this contract, discussed the difficulties arising from the deteriorating situation in the Soviet Union. According to Eu, the defendants were fully aware of these developments - in his view they were more aware of the situation than he was - and they did not at any stage challenge the existence of a force majeure situation or object to the notice of force majeure.

16 Eu testified that his suppliers had told him that they would try to ship as soon as possible and had indicated 3 January 1992 as a target. It was for that reason that, in his notice to the defendants, he had told the defendants that he expected that shipment would be on or about 3 January 1992.

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17 On 20 December 1991 Eu sent a fax to Sam wherein he stated that `it is now known and accepted in the international fertilizer community that force majeure was in progress in the USSR and that all shipments from there are pending until 18 January 1992 when certain decisions and regulations will be made known.` To this fax, Eu annexed a page from the ***Fertilizer Market Bulletin*** of 16 December 1991 and drew attention to the following paragraph:

> *The outlook for Soviet exports and marketing in general has been further confused by the formation of the new Commonwealth of Independent States. Following the Commonwealth announcement, it is understood that Agrochimexport delegations in India and Latin America returned hastily to Moscow. The future for Agrochimexport is still unclear although the state manufacturers association, Agrochim has now been renamed Russagrochim representing producers in Russia alone. The Ukraine meanwhile will control its own marketing from 1 January 1992 via Ukrfert.*

18 There was no response from the defendants to this letter.

19 The first response by the defendants to the plaintiffs` notice of 13 December 1991 was on 23 December 1991 when the defendants telexed the plaintiffs to say:

> *Re yr tlx of 13/12/91 v agree to accept shipmnt on 3 Jan 1992. However v reserve our right to sue for damages and losts [sic].*

20 It is noted that, in this response, the defendants chose to ignore the remarks in Eu`s fax letter of 20 December 1991 that there was confusion prevailing in the USSR and that the indications were that all shipments of urea from the USSR are pending until 18 January 1992.

21 On the same day, ie 23 December 1991, the defendants called upon BFCE to pay to them the US$95,150 against the standby LC issued under the performance bond. The bank informed Eu who spoke with Sam the next

morning and demanded to know why the defendants had done such a thing. He was told that the defendants had called on the performance bond because the bond was due to expire on 26 December 1991. Eu replied that if that was the only problem Sam should have informed him and in view of the force majeure situation he would have been bound to accept the request for extension. Eu told the court that in this conversation with Sam he told Sam that in view of the force majeure situation he could not promise a definite date (for shipment) but possibly the end of February would suffice. They then mutually agreed on 8 March 1992 as the expiry date for the performance bond. Eu told the court that pursuant to this conversation he instructed BFCE to extend the validity date of the performance bond to 8 March 1992. In a letter faxed to Sam the same day, Eu said:

> *We appreciate very much your agreement to withdraw your claim on our performance bond, and to allow an extension of the PB to 8 March 1992 due to the state of `force majeure` in the USSR. Your decision was most welcomed as I now don`t have to bother about any possible `injunction` **(Royal Design v Chang)** which my people were considering.*
>
> *We are most confident that this new date of 8 March 1992 graciously given by you will be more than adequate to allow us to complete the shipment delayed by the chaotic situation in the USSR.*

22 On 31 December 1991 Eu sent a fax in which he referred to the agreement to extend the validity date of the performance bond to 8 March 1992 and asked that the defendants amend the validity date and the shipment date under the LC accordingly. The LC was due to expire on 9 January 1992 and the shipment date as per the LC was 14 December 1991. In this fax Eu added:

> *We expect to be contacting our supplier again in the beginning of the new year and to be able to resolve the problems caused by the state of `force majeure` before March when the situation should have stabilised more over there.*

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23 Eu could not recall whether Sam, in requiring that the validity date of the performance bond be extended, had, on his part, specifically said that he would similarly extend the validity date of the LC, but, Eu expressed the view that this would be understood and it would make sense to have the expiry date of the LC tally with the expiry date of the performance bond as was the case from the beginning.

24 On 2 January 1992 the defendants replied to Eu`s fax of 31 March 1991. In their reply they said:

> *As per our tlx 612/T dd 31 Dec 91, v agreed to accept yr rqst fr shipmt extension till 03 Jan 92. H/ever v wll only consider any further rqst fr extension of L/C if there are signs that shipmt will be effected. Otherwise, it is a waste of time, money n effort.*
>
> *Furthermore, u did not, in yr fax ref no F2110/91, state when u cld effect shipmt n that of extension of shipmt date n L/C validity date u wld require.*

25 The reference to telex `612/T` as being dated 31 December 1991 appears to be a mistake. Telex `612/T` was dated 23 December 1991. The reference to fax `F2110/911` is a reference to Eu`s fax of 31 March 1991 under reply.

26 Eu told the court that upon receipt of the above telex he telephoned Sim. Sim told him that every time the bank was instructed to do something they charged for their services, so it would be easier to instruct the bank once and for all when the date for shipment had been confirmed. Sim asked when the date of shipment would be. When Eu replied that because of the force majeure he could not give a specific date, Sim told Eu that he could (only) do something about the LC when Eu gave a specific date for the shipment. Eu told the court that up to that time he did not receive the impression from any of his conversations with Sam and/or Sim or from any of the telexes or letters from the defendants that 3 January 1992 was to be the last date for shipment.

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27 Eu told the court that although the defendants had never asked him to produce any certificate of force majeure (as provided in cl 17B of the contract), he nevertheless asked his suppliers for such a certificate. The suppliers found it difficult to obtain such certificate as evidenced by a fax dated 7 January 1992 from the suppliers to the plaintiffs which read:

> *As per our telephone conversation, we have been trying to hurry the Russian authorities, this is an almost impossible task. The bureaucrats in the departments we are in need of to substantiate force majeure, move very slowly, they could not care any more or less of deadlines we have to meet, their own jobs and departments are not very secure, they may be gone tomorrow as has been the case of countless government agencies and departments.*
>
> *Part of the force majeure is also part of the delay in getting the document substantiating the force majeure. Any person being able to watch TV or read will know of the catastrophic turmoil in the former USSR. The shipment will be made this month.*

28 The plaintiffs therefore attempted to obtain a certificate from the Soviet Embassy in Singapore.

29 On 13 January 1992, the plaintiffs sent to the defendants a letter of even date, on the letterhead of the `Embassy of the USSR in the Republic of Singapore` signed by one V Vershinin, Deputy Trade Representative, which stated:

> *I would like to inform you that the political situation in the former Soviet Union has changed very seriously. There is much changes in the governments and their authorities and agencies and departments.*
>
> *One of main problems is prior transportation and export licenses and permits must be reissued and rescheduled under newly issued licenses from originating republics or states. Additional arrangements must also be make for such restricted goods to travel through a republic or state not that of original issuance of license or to use port in a republic not issuing the export license. This can cause shipments under old license to halt or delay.*

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30 In their covering letter, the plaintiffs said:

> *Please rest assured that we all are doing our utmost to clear this force majeure situation as soon as is possible. At the moment, it is very difficult to communicate with and receive communication from any part of the former USSR, especially Moscow. Most, if not all, of the government employees and officials are reluctant to commit themselves and become involved in matters that concerned the former USSR prior to 31 December 1991. With the formation of the Commonwealth of Independent States, their priorities are understandably elsewhere.*
>
> *If we receive any further communication, we shall forward the same to you at our soonest. If you have anything further, please do not hesitate to contact us.*

31 On 14 January 1992, the defendants called on the performance bond by drawing on the standby LC furnished by BFCE. As required by the LC the letter calling in the bond stated, inter alia, that the plaintiffs had `failed to deliver the subject commodity aboard the carrying vessel on or before the last shipment date stipulated in the documentary credit`. Having called on the bond the defendants, on the same day, informed the plaintiffs they had called on the bond because the plaintiffs had failed to deliver the prilled urea on 3 January 1992 and/or in accordance with the terms of the contract.

32 The plaintiffs responded on 15 January 1992 reiterating that force majeure applied and explaining that in this case the force majeure was of such nature that it was impossible to obtain the force majeure certificate from the competent authority within the required time frame: `... because such authority(s) no longer exist in the former Soviet Union as before the political turmoil. It requires time to determine who the appropriate parties are and to communicate with them to comply with our requirements`. The plaintiffs asked the defendants to reconsider their claim on the performance bond.

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33 On 16 January 1992, the defendants replied to say that they were proceeding on the claim on the performance bond for the following reasons:

> (a) The plaintiffs failed to deliver the urea by the latest shipment date of 3 January 1992.
>
> (b) The letter from the USSR Embassy in Singapore was not in accordance with cl 17(b) of the contract in that it was not issued by a competent authority in the place where the force majeure occurred.

34 Pursuant to the demand by the plaintiffs, BFCE effected payment of US$95,150 to the defendants.

35 The plaintiffs, through their agents in Europe, managed to obtain two further certificates from the Soviet authorities which they faxed to the defendants. Both certificates were dated 18 January 1992. One was in English and the other in Russian (with an English translation). The certificate in Russian was on a letterhead entitled `Staff of the USSR President, Moscow, Kremlin`. It was headed: `Re Shipment of 25,000 mt (carbamide) 50 kg per packet under the contract`, and bore an official stamp and was signed by the Deputy Director, Scientific Technology Centre `Sistema`. It read:

> *This is to confirm that from the middle of November 1991 political situation in former USSR stimulated disruption and confusion in government bodies. The abovementioned developments resulted in failure of shipment because of force-majeure international circumstances.*
>
> *One of the main problems is that all the licences for transportation issued before should be re-registered.*
>
> *Additional agreement should be concluded regarding transportation of such specific goods through the territory of other republics (as now there are no licences for transportation through republics).*

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36 The certificate in English bore the same signature and official stamp as that in the certificate in Russian and it was to similar effect.

37 On 31 January 1992, the plaintiffs` solicitors wrote to the defendants` solicitors to say that the plaintiffs treated the defendants` conduct on calling on the performance bond on 14 January 1992 as a repudiatory breach, accepted the breach and claimed damages for such breach. They then commenced these proceedings.

38 Besides Eu, the plaintiffs called one other witness. This was Dr Trond Gilbert, a Senior Fellow attached to the Political Science Department of the National University of Singapore who gave expert evidence on the collapse of the Soviet Union. I will deal with his evidence later. The defendants, for their part, adduced evidence from Sam and Sim.

39 Sam and Sim Seo Moo (Sim) were the only two officers of the defendants who dealt with the plaintiffs on this contract. Sam agreed that the latest shipment date for the first consignment of 25,000 metric tons of urea was, by the terms of the LC opened by the defendants, 14 December 1991. He told the court that the end-buyers had cancelled their contract with the defendants and so he tried on 1 and 15 November 1991 to cancel the defendants` contract with the plaintiffs. This attempt was however unsuccessful. In cross-examination, Sam agreed that the defendants` attempt at cancellation could have resulted in the plaintiffs` suppliers putting the contract on hold.

40 Sam told the court that he did not remember reading the plaintiffs` telex to the defendants of 13 December 1991 (the force majeure notice) but he knew of it because Sim had told him that the plaintiffs had declared force majeure. Thereafter he had told Sim to write to the plaintiffs agreeing to 3 January 1992

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as the shipment date but reserving the defendants` rights. Sam confirmed that he had agreed with Eu that the defendants would withdraw the claim they had made on 23 December 1991 on the performance bond if the plaintiffs extended the validity date of the bond to 8 March 1992 but he told the court that at the same time he expressly told Eu that the shipment date was to be 3 January 1992. When asked why 8 March 1992 was chosen Sam said that it would cost money each time the plaintiffs extended the validity date of the performance bond and so they decided on a three-month extension period in case there were further delays.

41 Sam agreed with counsel for the plaintiffs that neither he nor anyone else in the defendant company had, at the material time, challenged the plaintiffs` claim that there were force majeure conditions prevailing in the USSR. He told the court that he did not challenge the claim as there was, at that stage, no need for the defendants to do so. As the contract gave the plaintiffs 30 days within which to provide a certification of force majeure, he decided to wait for that certification before taking a position.

42 Sam confirmed that on 14 January 1992 he received a letter from the plaintiffs enclosing a letter dated 13 January 1992 from the Embassy of the USSR in Singapore. He did not, however, consider the letter to be valid certificate of force majeure in terms of cl 17 of the contract for the following reasons:

> (a) He did not believe that there was interruption or stoppage of shipment of urea out of the USSR during the relevant time.
>
> (b) The certificate of force majeure had to be `issued by a competent government authority at the place where the force majeure occurred as evidence thereof`. The force majeure certificate in this case was not issued by such an authority.

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> (c) The force majeure certificate had to be immediately `telex cabled` and sent to the buyer within 30 days thereafter `by registered airmail`. This was not done.

43 He therefore decided to call on the performance bond as the plaintiffs had failed to deliver the urea by 3 January 1992.

44 Sim was a somewhat reluctant witness for the defendants. He was at the relevant time the person in charge of the defendants` chemical division. He reported directly to Sam. At the time of the hearing he was no longer in the employ of the defendants. The defendants had difficulty in obtaining Sim`s affidavit evidence-in-chief and obtained leave of court to lead his evidence from the witness box. Sim denied that he had received AB82 (the force majeure notice) on 13 December 1991. He said that he could have seen AB82 when Sam showed it to him subsequently and asked him to reply to it. Sim confirmed that the plaintiffs had told him at that time that they could not deliver the urea because of the force majeure conditions then prevailing in the USSR. He denied that he had agreed with the plaintiffs that such conditions existed but in cross-examination he admitted that, as at 2 January 1992, he knew from other sources that the supply of urea from the USSR was almost at a standstill.

45 In their pleadings, the plaintiffs claimed, inter alia:

> (a) that it was public knowledge that in early December 1991 the USSR was in the throes and spasms of political re-organisation;
>
> (b) that the defendants at all material times were fully aware of the political upheavals in the USSR and had accepted the plaintiffs` notice to them on 13 December 1991 that a force majeure situation was prevailing which incapacitated the plaintiffs from performing the contract;

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> (c) that notwithstanding their knowledge and acceptance of the force majeure situation, the defendants on 14 January 1992 wrongfully forfeited the performance bond;
>
> (d) that as the sole ground relied on by the plaintiffs in forfeiting the performance bond was that the plaintiffs had failed to deliver the goods by 3 January 1992, they are estopped from subsequently asserting (as they purported to do on 16 January 1992), that there was no valid force majeure certification as required by cl 17 of the contract;
>
> (e) that the grounds relied on by the defendants in forfeiting the performance bond are misconceived and baseless and the defendants are, accordingly, in repudiatory breach of the sale contract;
>
> (f) that, alternatively, in view of the circumstances prevailing in the USSR the procurement of a force majeure certificate was itself rendered impossible; and
>
> (g) that, alternatively, the defendants were in repudiatory breach of the sale contract in forfeiting the performance bond notwithstanding that the plaintiffs had properly invoked cl 17.

46 The defendants, in their pleadings, accepted that they on 13 December 1991 received a telex from the plaintiffs purporting to invoke cl 17 of the contract but denied that they accepted the allegation that a state of force majeure prevailed in the USSR. The defendants averred that by their telex of 23 December 1991 they agreed to extend the shipment date to 3 January 1992 and that the plaintiffs, contrary to that agreement, failed to ship the goods by 3 January 1992. Accordingly, the defendant, on 14 January 1992 called on the performance bond as they were entitled to under the terms of the standby LC. The defendants further and/or alternatively alleged that the certificate of force majeure sent to the defendants by the plaintiffs on 13 January 1992 was not a valid certificate under the contract and that by reason of such defect cl 17 did not avail the plaintiffs. The defendants also denied the plaintiffs` allegations that it was public knowledge that at the material time the USSR was in the throes of political re-organisation and they denied the existence of events in the USSR that would constitute a force majeure situation entitling the plaintiffs to invoke

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cl 17 of the contract. The defendants denied the allegation that they had, by calling on the performance bond, repudiated the contract and asserted that they, at all material times, had been able and willing to continue with the contract.

47 I will, before considering the other submissions made, first consider the submission made by Mr Tan Tee Jim, counsel for the defendants, that as the defendants` call on the performance bond was made strictly in accordance with the terms specified in the bond, the validity of that call could not be impugned and these proceedings against the defendants should fail in limine.

48 ***The call on the performance bond***

49 Mr Tan submitted, on the basis of copious authorities that he quoted, that in law a performance bond is a contract separate, autonomous and independent of the sale contract; that only the terms of the performance bond are to be looked at in order to ascertain if the beneficiary had rightfully called on the bond; the only recognised exception to the right of the beneficiary to call was fraud; that force majeure is not a recognised exception; and that, in this case, as no fraud had been alleged, even if there was in fact a situation of force majeure and the plaintiffs had properly invoked cl 17 of the contract, the validity of the call made on the bond could not be impugned as the call was in terms that complied with the requirements stated in the bond

50 I have no difficulty with Mr Tan`s submission on the rights of a beneficiary to call on a performance bond. It is established law that, in the absence of fraud, whatever the underlying contract may provide, the party providing the bond (guarantor) is obliged to pay under the bond so long as the demand by the beneficiary conforms with the requirements of the bond. But the issue in this case is not the validity of the demand vis-a-vis the guarantor; the

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issue is whether in making that demand the defendants were in breach of their contractual obligation to the plaintiffs under the sale contract. That is an issue that the defendants have failed to address.

51 The sale contract, in cl 16, stipulated that the plaintiffs were to procure a performance ***bond `which shall cover performance of delivery of goods in accordance with specification as stated in this contract*** `. The purport of cl 16 appears to be that the defendants can exercise their right to call under the performance bond only if delivery of the goods was not in accordance with the sale contract. Under the sale contract, a breach of its terms is a pre-requisite to a call on the performance bond. If the defendants call on the performance bond without there being any breach of the sale contract, such a call, although unimpeachable by the guarantor, would nevertheless be a breach of the defendants` obligation to the plaintiffs under the sale contract. I therefore cannot accept the submission of the defendants that, because the call on the performance bond was in accordance with the terms specified in the performance bond, the plaintiffs` claim in this action must necessarily fail.

52 ***The `estoppel` point***

53 Counsel for the plaintiffs pointed out that during the material time the defendants had not, even once, either orally or in writing, challenged the invocation by the plaintiffs of the force majeure clause; even when the defendants called on the performance bond the reason they gave for the call was that the plaintiffs had not delivered the goods by 3 January 1992; they did not, even then, deny the existence of a force majeure situation in the USSR. Counsel submitted that the defendants had by their conduct accepted that there was in fact a force majeure situation prevailing in the USSR.

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54 It is pertinent to note that what was alleged against the defendants is that the defendants had not denied the existence of a force majeure situation; it was not alleged that the defendants had represented to the plaintiffs that they accepted that a situation of force majeure was prevailing in the USSR.

55 Whatever the defendants may or may not have known or thought about the developments in the USSR at the material time, and whatever their views may have been as to whether those developments would constitute a force majeure under the sale contract, the onus was on the plaintiffs to bring themselves within that clause. The defendants were entitled to reserve their position. They were under no obligation, at that stage, to let the plaintiffs know what their position, vis-a-vis the claim of force majeure, was. The initial failure to reject the force majeure notice or deny the claims of force majeure made by the plaintiffs cannot therefore constitute an estoppel against the defendants. (See ***Greenwood v Martins Bank*** [1933] AC 51.)

56 The failure by the defendants in their letter to the plaintiffs of 14 January 1992 to mention the absence of a valid force majeure certification as one of the grounds for calling on the performance bond also, in my view, cannot be construed against the defendants as an estoppel. There was no obligation on the defendants, at that stage, to give all the reasons that prompted them to call on the performance bond. In any event, by calling on the performance bond on the grounds that shipment had not been effected the defendants were implicitly taking the position that the protection of the force majeure clause was not available to the plaintiffs.

57 ***Time of the essence***

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58 The latest shipment date as stipulated in the LC opened by the defendants was 14 December 1991. The first reference to 3 January 1992 being the shipment date was in the plaintiffs` notice of force majeure dated 13 December 1991 where the plaintiffs stated that they expect the shipment would be on or before 3 January 1992 and asked for the shipment date in the LC to be extended. In the event that expectation turned out to be too optimistic. On 20 December 1991 the plaintiffs informed the defendants that the force majeure situation was such that all shipments from the USSR were pending until 18 January 1992.

59 The plaintiffs submitted that the language used in their letter of 13 December 1991, the extension of the validity date of the performance bond to March 1992, the correspondence between the parties, and the failure by the defendants to extend the latest shipment date in the LC to 3 January 1992 all indicated that both parties treated 3 January 1992 as being no more than an indication by the plaintiffs that they hoped to ship on 3 January 1992. The plaintiffs submitted that that being so it could not be said that 3 January 1992 was the date by which it was obligatory for the plaintiffs to have effected the shipment. The plaintiffs submitted that in the circumstances, regardless of whether there was at that time a force majeure situation, the defendants, in calling on the performance bond, were in breach of the sale contract.

60 The plaintiffs had in November 1991 tried to get the defendants to extend the latest shipping date stipulated in the LC on the grounds that the attempt by the defendants to cancel the contract had resulted in delays in effecting the shipment. The defendants had refused to agree to any extension. However, on 23 December 1991, soon after the plaintiffs had given notice of force majeure and indicated that they expected to be able to effect shipment on

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3 January 1992, the defendants, whilst reserving their rights, agreed to accept 3 January 1992 as the shipment date.

61 23 December 1991 was also the day on which the defendants made an (aborted) call on the performance bond. I accept the evidence of Sam that he called on the performance bond because the bond was due to expire on 26 December 1991 and calling on the performance bond was a sure way of protecting the defendants` interests as the call would prompt the plaintiffs to take immediate steps to extend the validity date of the performance bond. I also accept his evidence that in requiring that the plaintiffs extend the validity date of the performance bond and in agreeing to its extension to 8 March 1992 he was not agreeing to the shipment date in the LC being extended for a similar period. I accept Sam`s evidence that he specifically told Eu that shipment had to be made before 3 January 1992 and that, in order to save costs, he would cause the LC to be amended when the plaintiffs confirmed the shipping date. I would, in this context, in fairness to Eu, note that Eu did not allege that the defendants had specifically agreed to extend the validity date and the shipment date in the LC - all that Eu said was that when Sam agreed to the validity date of the performance bond being extended to 8 March 1992 it was `understood` that the validity date of the LC would be similarly extended.

62 I find the facts to be that in response to the requests by the plaintiffs to have the last shipment date stipulated in the LC extended, the defendants agreed to extend the date to 3 January 1992 and committed themselves to making the necessary amendments to the LC upon the plaintiffs confirming that the shipment would be so effected. In the event, as there was no such confirmation, the defendants did not cause the LC to be amended. In those circumstances, when the plaintiffs failed to ship the cargo on 3 January 1992, the plaintiffs, barring the occurrence of a force majeure event, would be in breach of their

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obligation to effect the shipment and the defendants would have been entitled to call on the performance bond. The defendants` call on the performance bond would not therefore, per se, be a breach of the sale contract. It would be a breach only if the plaintiffs, at that time, enjoyed the protection of the force majeure clause in the sale contract. It would therefore be necessary to consider the provisions of the force majeure clause.

63 ***The force majeure clause***

64 The provisions relating to force majeure in the sale contract in this case were as follows:

> *(17) Force majeure*
>
> A Force majeure means the situation/condition being not under human control, meaning act of God, such as storms, fire, war, military action, government emergency order, stop-order of strike, transportation accident, etc.
>
> B The seller will not be responsible the non-performance of this contract in case of force majeure but, when force majeure happens, the seller must immediately telex or cable and send to the buyer within 30 days thereafter by registered airmail, certificate of force majeure issued by a competent government authority at the place where the force majeure occurred as evidence thereof.
>
> C The buyer, likewise, shall not be responsible for non-performance due to force majeure. In such case, the buyer shall notify the seller immediately by telex of the force majeure and shall send the seller within 30 days thereafter, by registered airmail, a certificate of force majeure issued by a competent government authority or by the China Council for the Promotion of International Trade.
>
> D Should the effect of the force majeure continue for more than 120 consecutive days, the buyer and the seller shall discuss through friendly negotiation, as soon as possible, their obligation to continue to perform under the terms and conditions of the contract.

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65 What is referred to as force majeure in our law (as opposed to French law from which that term originates) is really no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little or no control, that might impede or obstruct the performance of the contract. There can therefore be no general rule as to what constitutes a situation of force majeure. Whether such a (force majeure) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for.

66 Mr Tan submitted that as defined in cl 17A, force majeure referred only to situations not under human control, like acts of God. To overcome the difficulty that cl 17A contains so many examples that are clearly not attributable to acts of God, Mr Tan submitted in the construction of a document, if the examples given contradicted the clear meaning of the provision, then the clear meaning should be given preference and the examples that contradicted the clear meaning should be ignored. In support of this proposition, Mr Tan quoted the following paragraphs from Bennion, ***Statutory Interpretation*** (2nd Ed) p 504 where the learned author states

> *(1) Where an Act includes an example of its operation, this is to be treated as a detailed indication of how Parliament intended the enactment to operate in practice.*
>
> (2) If an example contradicts the clear meaning of the enactment, the latter is accorded preference, it being assumed in the absence of indication to the contrary that the framer of the example was in error.

67 Mr Tan submitted that although ***Bennion*** refers to the construction of statutes, similar considerations would apply in the construction of contracts. He submitted that, whatever may have been the prevailing political or economic situation in the USSR at the relevant time, that situation was man-made and

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would not be an act of God and, accordingly, the plaintiffs could not invoke the force majeure clause.

68 The plaintiffs, on the other hand, contended that there was no error in the examples. They submitted that the examples illustrate the true spirit and meaning of what the parties intended when they entered into the agreement. The plaintiffs also pointed out that this clause (and indeed the whole sale contract) was drafted by the defendants and if the defendants had intended not to include war, military action, government emergency orders, strikes, etc, within the compass of the force majeure clause they should not have included these examples in the clause. This was particularly so since at the time the contract was drafted by the defendants there were already indications of social and political upheavals in the Soviet Union and the defendants, if they wished to limit the scope of the force majeure clause, should not have included so many examples that tended to show that a wide meaning to the words `act of God` was intended.

69 In the interpretation of a contract the court is seeking to ascertain what the true agreement of the parties as expressed in the contract is. In so doing, the court is entitled to look at the factual matrix in which the contract was concluded and is entitled to take into account each party`s view as to what the words of the contract was intended to mean. In this case, the defendants wish to adopt a construction so restricted that even a situation that rendered international trade impossible, such as (say) an all-out war amongst the Republics in the former USSR, would not amount to a force majeure since war would not be an act of God in the strict sense. Such a construction would be contrary to almost all the examples of force majeure listed in cl 17A. Out of the eight situations listed, only one, namely, `storms` is an example of an act of God. All the other seven examples given (save perhaps `fire`) cannot be said to be acts of God if that

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phrase is given the narrow meaning preferred by the defendants. I cannot see how, if the defendants had intended that the clause was to include only acts of God in the strict sense of the word, they could have inserted so many contradictory examples. If there was only one example that was inconsistent then, perhaps, as suggested by ***Bennion*** , that example can be said to be in error. The presence of so many contrary examples, in my view, indicates that the parties intended to give the phrases `act of God` and `situation/condition not under human control` a meaning wide enough to encompass those examples. In view of the nature of the examples given in cl 17, the construction favoured by the plaintiffs appears to me to be the more reasonable and more appropriate construction.

70 I am therefore of the view that the force majeure clause in this case extends to situations such as war, military action, etc, envisaged in cl 17A. The question therefore arises whether the developments in the former USSR at that time can constitute a force majeure as envisaged and, if so, whether the plaintiffs have brought themselves within the protection accorded by cll 17B and 17D.

71 ***The break-up of the USSR***

72 The defendants, in their pleadings, had denied the plaintiffs` assertion that at the relevant time the USSR was in the throes of a political re-organisation. The plaintiffs therefore called Dr Trond Gilbert, a Senior Fellow attached to the Political Science Department of the National University of Singapore, to testify as an expert on the political situation prevailing in the USSR at the time immediately prior to and following the dissolution of the USSR on 9 December 1991 and, in particular, the difficulties prevailing in the Ukraine as it was the plaintiffs` case that the urea was to be transported from the Ukraine to the port of Novorossisk in Russia for shipment to China.

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73 The defendants had indicated that they would be calling one Nikolai Sergei as an expert witness on Soviet affairs but elected to close their case without calling that witness. The evidence as to the state of affairs in the former Soviet Union as at the relevant time was therefore only that of Dr Gilbert.

74 Dr Gilbert`s evidence in brief was that from mid-1991 certain constituent republics of the USSR began to seek autonomy and began clamouring for a more democratic form of government. Their relationship with the Soviet authorities in Moscow progressively deteriorated and Moscow began losing its control over its domain. One of the effects of the resulting internal strife was that the republics which sought independence refused to co-operate with Moscow and would not recognise many decrees, documentation and the like issued out of Moscow. The central administrative machinery of the country broke down and the independent states began the process of erecting their own administrative, commercial and financial barriers against Russian influence. The situation became quite untenable and the USSR was formally dissolved on 9 December 1991. There was during that period considerable confusion and trade and shipment of goods throughout the country and its ports were severely affected. Dr Gilbert referred the court to statistics to show that the level of both foreign and inter-state trade in the former Soviet Union decreased dramatically at about this time.

75 Dr Gilbert told the court that Novorossisk was on the Russian side of the Black Sea and that to get to Novorossisk from Ukraine one had to go through the Crimean Peninsula. The Crimean Peninsula was part of Ukraine but had until 1954 been part of Russia. Substantial numbers of Russians lived in the Crimea. On 2 December 1991, Ukrainians voted for independence from the USSR. On 3 December 1991, ***The Straits Times*** carried a report that the Russian President, Boris Yeltsin, had warned that a Ukrainian break with the

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Union could prompt a review of existing boundaries. On 4 December 1991, ***The Straits Times*** reported that the independence vote in the Ukraine brought a warning from President Gorbachev who said that the disintegration of the Soviet Union would create a threat of war and be a catastrophe for the world.

76 Dr Gilbert told the court there was a good deal of separatist activities in the Crimean Peninsula. In addition, immediately before the dissolution there was feuding between the Ukraine republic, Russia and the USSR over matters such as banking, customs and shipment licenses. Licences previously issued by the USSR were not recognised in the Ukraine or in Russia. On 11 December 1991, United States Secretary of State, James Baker, was reported to have expressed fear that the disintegration of the Soviet Union could explode into the kind of warfare that had wracked Yugoslavia with the added danger of nuclear weapons thrown in.

77 When the Soviet Union was dissolved on 9 December 1991, an association of republics called the Commonwealth of Independent States (CIS) was formed with the Ukraine as a member. Dr Gilbert testified that Ukraine was reluctant to join the CIS and, when it did so, detailed trade and other arrangements with the other CIS republics had not been worked out.

78 The Soviet Black Sea Fleet was located in the Crimea. Ukraine wanted control of the fleet. The Russians refused. Mr Gilbert told the court that at that time Mr Baker visited the Ukraine and the rumour in Washington was that one of his tasks was to prevent Yeltsin from going to war over the Crimea and the Black Sea Fleet. On 12 December 1991, Mr Gates, the chief of the Central Intelligence Agency, who was a Soviet expert, was reported to have told the House of Representatives Armed Services Committee that `the situation (in the Ukraine) is dangerously unstable`. He was also reported to have said:

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> *The economy is in a free fall with no prospects of reversal in sight. Severe economic conditions including substantial shortages of food and fuel in some areas, the disintegration of the armed forces and ongoing ethnic conflict will combine this winter to produce the most significant disorder in the former USSR since the Bolsheviks consolidated power.*

79 In Dr Gilbert`s view, war over the Crimea was, at that time, a distinct possibility. He told the court that he would rank the situation prevailing in the former USSR at that time as being at par with `war`. That the situation did not explode into war was, in his view, fortuitous and partly the result of American pressure.

80 Dr Gilbert was asked how viable it would have been, at that time, to send urea from the Ukraine to the port of Novorossisk in Russia for loading. Dr Gilbert replied that because of the tensions in the area and because of the state of the economy there would be great trouble in doing so. In this context, he referred to a report in T ***he Straits Times*** of 16 December 1991 where the British Foreign Secretary, Douglas Hurd, is reported to have said that the republics in the disintegrating Soviet Union were `staring into an abyss` beyond which could be years of bankruptcy and bloodshed. Dr Gilbert said that in practical terms this meant that hundred of thousands of workers did not get paid, had no jobs, went on wild cat-strikes. This would have been a serious detriment to regular business activity.

81 The defendants challenged the credentials of Dr Gilbert as an expert on the grounds that his curriculum vitae indicated that he was more of an expert in Soviet military affairs than in political or economic affairs. Although his curriculum vitae did show that Dr Gilbert had done work with American authorities relating to military aspects of the Soviet Union, there was in his curriculum vitae sufficient material to show that he had studied and kept track

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of economic and political developments in the Soviet Union. In fact, Dr Gilbert is currently teaching an honours course at the Political Science Department of the National University of Singapore on `Post-communist business structures and procedures`. In 1991, while he was a professor at the University of Washington, he was analysing for the United States government as well as for private enterprise, the kind of business opportunities the prevailing political and economic conditions in the USSR would produce for potential investors. I was of the view that there was no merit in this challenge. Clearly, Dr Gilbert was an expert not only on Soviet military matters but also on the political and economic developments of the territories comprised in the Soviet Union.

82 In cross-examination, Dr Gilbert agreed that he was not asked to and he did not undertake a specific study of the customs and other requirements of goods entering Russia from Ukraine and being exported from Russia through Novorossisk in that period. He also agreed that the situation was not one where all airports, ports and transportation had shut down but he said that there was ample statistics to show that the tension between Ukraine and Russia caused a severe reduction of all kinds of transportation, including shipment of goods during this period. Dr Gilbert strongly disagreed with a suggestion by Mr Tan that the CIS came into existence peacefully and harmoniously. The situation, Dr Gilbert insisted, was explosive, not harmonious.

83 Dr Gilbert also disagreed with a suggestion by Mr Tan that the disintegration of the Soviet Union was, at that time, seen as inevitable. He told the court that many observers in the West did not take that view. For example, the United States continued to support Gorbachev until the last minute and Gorbachev remained President of USSR until 25 December 1991 - two weeks after the dissolution of the USSR. The United States, he said, was playing both sides. The situation at that time was very difficult and for the United States to

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wash its hands off either Yeltsin or Gorbachev (prematurely) would have produced even more chaos. The military and the right wing in the Soviet Union wanted to halt the decline of central power and this power struggle between the conservatives and the reformers continued into 1992 and 1993 as evidenced by the occupation, in October 1993, of Parliament building in Moscow by conservative and some military elements. Dr Gilbert told the court that the transfer of power from the Soviet Union to the republics was a very complicated process which caused very considerable disruption in the republics of the former Soviet Union.

84 The extensive cross-examination of Dr Gilbert, in my view, only helped to re-inforce Dr Gilbert`s account of the utter chaos that prevailed in the territories of the Soviet Union in the period just before and just after the dissolution of the Soviet Union on 12 December 1991. The struggle for sovereignty from Soviet rule and the resultant collapse of the USSR were events of such catastrophic and far-reaching proportions that I have no difficulty in accepting the view proffered by Dr Gilbert that the situation in December 1991 was at par with war. The situation was one that could clearly fall within the compass of the definition of force majeure in cl 17A.

85 Much of Eu`s testimony as to what was transpiring in the USSR was hearsay in the sense that Eu had no direct knowledge of the events and was only repeating what his suppliers or his suppliers` agent had told him. The expert evidence of Dr Gilbert, however, accorded with the views conveyed by Eu to the defendants in his communications with them at that time.

86 ***Did the force majeure clause apply?***

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87 Mr Tan submitted that it was not enough for the plaintiffs to adduce evidence on a `macro` basis of what happened in the USSR at that time. More was expected of the plaintiffs before they could succeed in their attempt to benefit from the force majeure contract. It was, he submitted, incumbent on the plaintiffs, both as a matter of common sense and as a well established principle of law, to go on and show how the events in the USSR specifically impacted on the supply, production, transportation and/or shipment of the subject urea. The plaintiffs, he submitted, must call evidence to show how the export of the urea was actually prevented or hindered. The plaintiffs must also, he submitted, show that there was no reasonable step that they could have taken to avoid the force majeure event(s) or mitigation its/their effect.

88 Mr Tan submitted that both Eu and Dr Gilbert had failed to address any of these points. He pointed out that when it was suggested to Eu that he had no evidence to show a specific force majeure event that impacted on the subject cargo, Eu`s response was:

> *I don`t know exactly what the position on the goods was. What I do know is that my supplier declared force majeure on us and from what I know of the situation in USSR that appeared reasonable. We in turn declared force majeure on defendants. I assumed that they accepted this notification for the same reason as we did in respect of our supplier.*

89 And when Eu was asked if he knew exactly what was the position with regard to the cargo at or about the time the plaintiffs invoked force majeure, Eu`s response was:

> *I did not know exactly where the goods were. I only knew that there were problems on transportation and logistics. That being the case, I did not see the need to enquire about the actual location of the 25,000 metric tons of urea.*

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90 I will deal briefly with the authorities relied on by the defendants in support of their submission. In ***PJ Van Der Zijden Wildhandel NV v Tucker & Cross Ltd*** [1975] 2 Lloyd`s Rep 240, the sellers had contracted to supply the buyers with a quantity of frozen Chinese rRabbits cif Rotterdam. The force majeure clause there had some similarities with the present clause. It provided:

> *Should the sellers fail to deliver the contracted goods ... by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control ... the contract might be cancelled but the sellers have to furnish the buyers with a certificate attesting such event or events.*

91 The sellers failed to deliver the frozen rabbit although they had contracted with their suppliers in China under which, if all had gone well, they would have been furnished with the goods which they had agreed to supply.

92 For the sellers in that case to obtain the benefit of the force majeure clause they would have to show that they failed to deliver `by reason of causes beyond their control`. The only evidence adduced by the sellers was that the import of frozen Chinese rabbits into the Netherlands was at the material time much smaller in quantity than the amounts called for under the contract and the court was invited from those limited facts to infer that Chinese rabbits were simply not available. Not surprisingly Donaldson J refused to draw such an inference and held that the sellers could not have the benefit of the force majeure clause as they had totally failed to prove that their failure to deliver was due to a force majeure situation. But in so holding Donaldson J said:

> *... it seems to me that there has been a total failure in this case on the part of the sellers to prove that* ***it was impossible*** *for them to fulfil their contracts, and accordingly, they are unable to take advantage of the protection afforded by the Chinese force majeure clause.*

93 Mr Tan, on the basis of this passage, submitted that the burden on the plaintiffs was to show that it was, at the material time, ***impossible*** to ship the urea out of the USSR. He submitted that as the evidence of Dr Gilbert was that international trade with the USSR was still continuing, albeit on a reduced basis, during the relevant time, the plaintiffs had failed to discharge the burden on them that it was ***impossible*** to ship the cargo.

94 In a cif contract there may be an obligation on the seller, before he can invoke force majeure, to show that it was not possible to fulfil the contract by buying goods afloat. An illustration of this is to be found in ***JH Vantol Ltd v Fairclough Dodd & Jones Ltd*** [1955] 1 WLR 642 where McNair LJ said at p 646:

> *It is well settled law that normally in the case of a cif contract that contract can be performed by the seller in one of two ways: either (1) by shipping himself or by his agents contract goods during the period stipulated for shipment by the contract and tendering the appropriate bills of lading; or (2) he can purchase goods afloat which have been so shipped. Generally, a seller cannot claim the protection of the clause which provides that the contract shall be cancelled if shipment is prevented by certain specific clauses unless he proves both (a) that he was himself so prevented from shipping and (b)* ***that it was impossible for him to fulfil the contract by buying goods afloat which had been shipped during the contract period.***

95 The contract in the ***Wildhandel*** case was a cif contract. It seems to me that in using the word `impossible` in the passage above, Donaldson J was referring to the need for the sellers, in such a contract, to show that it was impossible to buy goods afloat. To read that passage as requiring that recourse to protection under a force majeure clause would in all cases be available only if the parties invoking the clause prove that performance under the contract is `impossible` would be to cast a very high burden on such party. Such a

construction can, in my view, be justified only if the nature and terms of the force majeure clause in question so warrant.

96 The defendants submitted that there was an obligation on the defendants in the present case, in view of the situation prevailing in the USSR, to have sought alternative sources of supply in order to mitigate the situation and that the plaintiffs had failed in this obligation. I will deal with this submission later.

97 ***Channel Island Ferries Ltd v Sealink UK Ltd*** [1988] 1 Lloyd`s Rep 323, was another case quoted by the defendants. The force majeure clause there was also couched in language fairly close to that used in cl 17B. The clause there provided:

> *A party shall not be liable in the event of non-fulfilment of any obligation arising under this contract by reason of Act of God, disease, strikes, Lock-Outs, fire, and any accident or incident of any nature beyond the control of the relevant party.*

98 In that case the parties had entered into a joint venture whereby it was agreed that ***CIF*** and ***Sealink*** would charter certain vessels to the joint venture on a bareboat basis to enable the joint venture to crew the vessels offshore. ***Sealink*** was unable to keep to this agreement because the union refused to cooperate and went on strike to protest against the bareboat charter. ***Sealink*** negotiated with the union and settled the strike by agreeing not to charter on a bareboat basis. In line with the agreement with the unions, ***Sealink*** offered to charter to the joint venture two vessels on a time charter basis. ***CIF*** rejected this offer. ***Sealink*** sought the protection of the force majeure clause.

99 It was held that the act, by ***Sealink*** , of entering into the agreement with the union was as a result of a genuine choice made by ***Sealink*** and could not be said to be an act beyond the control of ***Sealink*** . ***Sealink*** was therefore not

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entitled to protection under the force majeure clause. This case is of little assistance to the defendants except insofar as it reiterates the principle that it is for the party relying in a force majeure clause to bring himself squarely within that clause.

100 The other cases cited by the defendants, namely, ***Tradax Export SA v Andre & CIF SA*** [1976] 1 Lloyd`s Rep 416, ***Bremer Handelsgesellschaft MBH v C Mackprang Jr*** [1979] 1 Lloyd`s Rep 221, ***Provimi Hellas AE v Warinco*** AG [1978] 1 Lloyd`s Rep 67, and ***Warinco AG v Fritz Mauthner*** [1978] 1 Lloyd`s Rep 151, all relate to the standard form of contract (known as GAFTA 100) used by the Grain and Feed Trade Association of the United States. These are specialised and rather complex contracts used by brokers in those trades and, in the words of Lord Denning MR in ***Bremer*** , `whenever one of these cases comes up before us on GAFTA 100 we get lost in the complications and technicalities which they present.` The principles of law, as contained in the passages in these cases highlighted by the defendants, were not in dispute. The dispute here was on whether those principles are applicable in the light of the force majeure clause and the nature of the force majeure event in this case. I therefore do not propose to go into a detailed consideration of those cases.

101 ***The need to mitigate***

102 The defendants submitted that as this was a contract for the sale of goods it was incumbent on the plaintiffs, before they could avail themselves of the protection of the force majeure clause, to show that they had tried to mitigate the position by trying to procure the urea from other sources. In support of this submission, Mr Tan referred to the case of ***Wildhandel*** where Donaldson J said:

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> *the contract called for Chinese rabbits, cif. Their obligation was, therefore, to tender documents, not to ship the rabbits themselves. If there were any Chinese rabbits afloat, they could have bought them, and it is for the sellers to show that no such rabbits were available.*

103 That statement by Donaldson J, whilst it was apposite in the context of ***Wildhandel*** , cannot, in my view, be taken as a principle of law applicable in all cases. This is seen in ***Tradax*** where Denning MR in dealing with a similar situation said:

> *If the shipment is delayed by force majeure or prevented by prohibition of export, the seller is not excused if he could have bought goods afloat to perform the contract. But it is different when the seller in a string had made arrangements to ship the goods - by himself or by some shipper higher up in the string. If those arrangements are already in existence when the shipment is delayed by force majeure or prevented by prohibition of export, the seller can rely on cl 22 or cl 21, as the case may be. He is not bound to buy afloat so as to fulfil his contract.*

104 The present case is clearly one where arrangements by a supplier higher up the string to ship the goods had already been made when the delay by reason of force majeure happened. There was, therefore, no obligation on the part of the plaintiffs to try and obtain the requisite urea through an alternative source.

105 But even apart from the fact that this was a case where the contract with the suppliers higher up the chain had been entered into at the time of the force majeure, this was not a contract under which the sellers were at liberty to buy goods afloat. The plaintiffs here were not merely obliged to deliver prilled urea of USSR origin but were in addition required to (a) mark the goods with specific shipping marks provided by the defendants; (b) ship the goods only in certain vessels not specifically prohibited by the contract; and (c) ship the goods from a specified port. I agree with the submission of the plaintiffs that, in such a situation, there was no question of buying goods afloat. This is further

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reinforced by the fact that the contract here was not a cif contract since, by the contract, the defendants were to provide insurance for the goods from the port of loading.

106 I have, earlier, considered the definition of force majeure as contained in cl 17A and arrived at the conclusion that the collapse of the Soviet Union had caused so much uncertainty, tension and chaos in the territories of the former Soviet Union that it was a situation akin to war and was capable of being a force majeure situation within the contemplation of cl 17A. But cl 17A is merely a definition section. It would not follow from the mere fact that a situation falling within that definition had arisen that the plaintiffs would get the benefits arising from a force majeure situation. To obtain those benefits the plaintiffs must come within the provision of cl 17B. (***Channel Island Ferries Ltd v Sealink UK Ltd.***)

107 Clause 17B states that the seller ***will not be responsible*** for non-performance of this contract ***in case of*** force majeure. In my view, the question that has to be asked before the seller under this contract can get the benefit of this clause is: has the seller proved that he was unable to ship the cargo in December 1991 because of the force majeure event that occurred (ie the collapse of the Soviet Union in December 1991)? If the seller, on balance, can persuade the court that that was the reason why the goods were not shipped, then he would have satisfied the burden on him.

108 Of course, if the plaintiffs pinpoint the exact event or events that happened in the USSR, vis-a-vis the particular cargo, that caused the delay, so much the better; but I cannot accept the submission of Mr Tan that, as a matter of law, a party claiming the benefit of a force majeure clause is obliged to trace exactly what happened to the cargo in question. Whether that will be so will

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depend, in my view, on the circumstances of the case and the nature of the force majeure alleged. If, for instance, a party sought to invoke force majeure, under a clause such as cl 17B, because of (say) a fire, it would clearly not be sufficient for that party to prove that there was a fire at a factory in the place where the cargo was to be obtained; he would have to go further and prove that that particular cargo was at the factory at that time and its shipment was delayed because of the fire. If the seller, in such a situation, failed to go into the details of how the fire affected the performance of his contract, he would not be able to prove that his shipment was delayed because of that force majeure situation. The chaos resulting from the disintegration of the USSR, however, is a situation very different from a situation arising from a fire or a strike at a factory. The plaintiffs have proved that there was widespread confusion in the USSR, international trade was drastically reduced, and war was imminent. The plaintiffs` claim that they could not effect shipment because of that chaotic situation is entirely believable and I am satisfied that the plaintiffs, even without having to incur the trouble and expense of calling witnesses from the USSR who could give direct evidence as to what happened to this particular cargo, have discharged the burden on them to show that the failure to ship was because of the force majeure situation then prevailing in the USSR as a result of the disintegration of the USSR.

109 ***Clause 17B - procedural requirements***

110 I now turn to consider the submissions of the defendants that the plaintiffs cannot obtain the benefit of the force majeure clause as the procedural requirements stipulated in the said clause have not been complied with.

111 (a) `Immediate` notice of force majeure certificate not given

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112 The defendants submitted that cl 17B required that, in order to invoke force majeure, the plaintiffs should: (a) ***immediately*** telex to the defendants ***the certificate of force majeure*** issued by a competent government authority at the place where the force majeure occurred; and (b) send the certificate itself to the defendants within 30 days of the telex. They submitted that, to conform with cl 17B, the defendants, at the time of giving notice of force majeure, should have telexed the contents of the certificate of force majeure. This was not done. The contents of the certificate of force majeure came to the notice of the defendants only on 13 January 1992. There had accordingly been a failure to comply with the requirements of cl 17B.

113 To construe cl 17B as requiring the seller, upon the occurrence of the force majeure event, to immediately telex the contents of the force majeure certificate to the defendants is, in my view, to strain the language of cl 17B. I cannot read such a requirement in cl 17B. It appears to me that cl 17B envisages that the seller, upon being unable to fulfil the contract because of the force majeure event, should immediately inform the defendants that they are invoking force majeure; they are then given a period of 30 days within which to obtain and send to the defendants a certificate from a competent government authority attesting to the occurrence of the alleged force majeure event. I therefore reject this submission.

114 (b) Notice of force majeure not given immediately

115 Dr Gilbert`s evidence was that the political upheavals in the USSR had commenced from about June 1990 and deteriorated significantly from about the time Ukraine declared sovereignty in July 1991. The defendants submitted that in the light of that evidence, the plaintiffs, in giving notice of force majeure on

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13 December 1991, could not be said to have given `immediate` notice of force majeure as envisaged by cl 17B.

116 Whilst it is true that the tensions in the USSR had been building up over a period of time, it is apparent from the evidence of Dr Gilbert that matters became really very critical only in December 1991. It was in December 1991 that the final break-up of the Soviet Union occurred and it was in December 1991 that the defendants` suppliers notified the plaintiffs that because of the force majeure conditions in the USSR they could not effect the shipment. I am satisfied, on the evidence, that it was in December 1991 that the political upheavals in the USSR became critical. In giving the notice of force majeure on 13 December 1991 the plaintiffs cannot, in my view, be said to have been in breach of the requirements of cl 17B that the sellers give immediate notice of force majeure.

117 (c) Certificate not issued by competent authority

118 The defendants submitted that as the certificate sent by the plaintiffs was issued by the Embassy of the USSR in Singapore it could not be said to be a certificate issued by `the competent government authority in the place where the force majeure occurred` as required by cl 17B. The plaintiffs` response to this submission was: (a) that the nature of the force majeure events that happened was such that it was really impossible for them to get such a certificate at that time and that the force majeure clause should apply in respect of the certificate itself, and (b) in any event the certificate contained the necessary confirmation of the events occurring in the USSR and as it was issued by the Soviet Embassy it was a certificate that conformed with the requirements of cl 17B.

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119 I accept the plaintiffs` submission. On the evidence, I am satisfied that the situation in the USSR at that time was such that it was clearly not possible to obtain such a certificate. The certificate issued by the USSR Embassy in Singapore was, in the circumstances, a sufficient compliance of the requirements of cl 17B that the certificate should be issued by the competent government authority in the place where the force majeure occurred.

120 (d) Contents of certificate insufficient

121 Mr Tan submitted that the certificate dated 13 January 1992 given by Mr V Vershinin of the Embassy of the USSR in Singapore and the certificate dated 18 January 1992 given by Mr Semenov under the letterhead of the `Staff of the USSR President` dated 18 December 1991 were both unsatisfactory because they did not descend into the details as to why shipment of the particular cargo was delayed. He also invited the court to draw adverse inferences from the fact that neither Mr Vershinin nor Mr Semenov were called by the plaintiffs to testify at the hearing.

122 In ***Hoecheong Products Co Ltd v Cargill Hong Kong Ltd*** [1995] 1 Lloyd`s Rep 584, the Privy Council had occasion to examine the question of the sufficiency of a certificate under a similar force majeure clause. In that case, the sellers agreed to ship to the buyers 10,000 tonnes cotton seed expellers between 15 December 1986 and January 1987 from a port in China. The contract provided, inter alia:

> *12 Force majeure: Should seller fail to deliver the contracted goods or effect the shipment in time by reason of ... any other causes beyond their control ... a part/whole of the contract might be cancelled but* ***the seller has to furnish the buyer with a certificate issued by China Council for the Promotion of International Trade (CCPIT)*** *or an independent and competent Chinese authority* ***attesting such event or events.***

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123 The sellers were only able to deliver 1,000 tonnes of expellers and a certificate from the CCPIT was tendered to the buyers stating, inter alia:

> *It`s certificated that Henan province has got heavy losses and reduction of cotton, grain and etc, as an exceptionally serious in history and force majeure drought in 1986 in Henan province of PROC.*

124 The buyers claimed damages. The sellers sought to rely on the force majeure clause contending that the contract called for goods originating in Henan province, and that there had been such a severe drought in Henan during the growing season that it was impossible for them to procure the goods from the only permitted suppliers. The buyers denied that the force majeure clause applied or that the formalities which it prescribed had been complied with. In particular, the buyers disputed the sufficiency of the force majeure certificate tendered. Three different views were canvassed before the court:

> *1 The certificate must be exhaustive and cover all the requirements necessary for the force majeure clause to be effectively, namely,*
>
> (a) that there had been at the material time an event of the kind stipulated in the force majeure clause operating;
>
> (b) that this event had adversely affected the supply of the goods; and
>
> (c) that the sellers could not overcome this adverse effect by obtaining the goods from an alternative source;
>
> *2 The document must certify that the first two requirements were satisfied but need not deal with the impossibility of purchasing alternative goods.*
>
> (3) The document need certify only the occurrence of a force majeure event.

125 Lord Mustill, in opting for the third view, and in holding that the certificate tendered complied with the requirements of the force majeure clause, said:

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The choice between these rival constructions raises no question of principle, and no reported case can be expected to help. The clause does not express in clear language its intended result. If it had been a conclusive and exclusive evidence provision, as cl 8 appears to be in its use of the words `as final`, it would be easy to assume that the contents of the certificate were meant to comprise all the elements which would have to be established to create a defence under the first part of the clause. It is however clear that this is not so. The requirement for a certificate is additional to, not a substitute for, proof that facts exist which bring the exception into play. The question therefore arises: given that the sellers have in any event to prove by evidence that the whole of the requirements of the exception are satisfied, how much of the same ground has to be covered again by the certificate? As regards the existence of the force majeure event an attestation by CCPIT would be both useful and practicable. It would be useful because, in the event of non-shipment, when suspicions might well arise about the bona fides of the sellers` asserted excuse, it would furnish an independent and fairly rapid (albeit non-binding) demonstration that the sellers were not relying on an invented excuse for disregarding their obligations; and it would be practicable, because CCPIT would be well placed to know, or if necessary to find out, just what the conditions were at the relevant time in the place of origin. The same cannot be said of any requirement that the document should certify the other two elements necessary to bring the exception into play. To require the investigation of what might be quite complex facts, simply to attest a state of affairs peculiar to the one individual transaction, which would have to be looked at all over again at the stage of litigation or arbitration would be pointless. Moreover, even if CCPIT would be willing to certify not only the effect of the force majeure event on the individual position of the sellers, but also their inability to buy-in elsewhere, the organization could not achieve this simply by using its own sources of information, and would have to conduct some kind of semi-judicial investigation, based on information supplied by the sellers and untested by the buyers. This would be both cumbersome and vulnerable to error.

In these circumstances their Lordships consider that ***from a practical point of view the third of the interpretations listed above is much to be preferred, and that since the wording of the clause does not point unequivocally the other way, the clause should be understood as requiring only that CCPIT should attest the occurrence of the force majeure event****. On this view the certificate actually tendered was in compliance with the clause, and all the other requirements of the exception being fulfilled the sellers are not liable for the short delivery.*

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126 In the ***Hoecheong*** case, the sellers had to furnish the buyers with a certificate `attesting` the force majeure event. In our present case, the sellers had to furnish the buyers with a certificate as `evidence` of the force majeure event. Though not couched in the same words, the requirements as to the certificate in the present case is broadly similar to the requirements in the ***Hoecheong*** case. As in the case of ***Hoecheong*** , the wording of the force majeure clause in the present case suggests that the certificate of force majeure need concern itself only with the alleged force majeure event - there is no suggestion in cl 17B that the certificate need concern itself with what exactly happened to the particular cargo. The requirement for the certificate was, as in the case of ***Hoecheong*** , additional to, and not in substitution of, proof by evidence that there was a force majeure situation and that the sellers were entitled to the benefit of the force majeure clause. I agree with the view expressed by Lord Mustill that to require the investigation of what might be quite complex facts, simply to attest a state of affairs peculiar to the one individual transaction, which would have to be looked at all over again at the stage of litigation or arbitration, would be pointless. I am of the view that the certificate envisaged by cl 17B need concern itself only with the occurrence of the force majeure event and does not need to address the question of how those events affected the cargo in question. In any event, on the facts of the present case, I have already come to the conclusion that the force majeure event that occurred was so catastrophic in nature that the sellers, even without adducing evidence from those who handled the contract at the Soviet end, have satisfied the onus on them to show that their failure to ship the cargo was as a result of the force majeure conditions then prevailing in the USSR. In the absence of any specific requirement in cl 17B that the certificate should provide such details I cannot, in the circumstances, accept the submission of the defendants that the absence of such details renders the certificates tendered ineffectual.

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127 ***Findings***

128 I am satisfied, on the evidence adduced, that there was a situation of force majeure, within the meaning of cl 17A, prevailing in the USSR when the plaintiffs gave notice of force majeure on 13 December 1991. I am satisfied that the plaintiffs were unable to ship the cargo of urea on 14 December 1991 and on the extended shipment date of 3 January 1992 because of this state of force majeure. I am satisfied that the notice, given by the plaintiffs on 13 December 1991, complied with the requirements of cl 17B. I am satisfied that because of the force majeure situation prevailing at that time it was not possible for the plaintiffs to obtain and serve on the defendants, within the time stipulated in cl 17B, a certificate of force majeure from a competent authority at the place where the force majeure occurred but I find that the certificate issued by the Embassy of the USSR and served on the defendants on 13 January 1992 was a sufficient compliance of cl 17B.

129 As the plaintiffs had properly invoked the force majeure clause in the contract, the defendants were by cl 17D, obliged to wait for a period of up to 120 days from the date notice of force majeure was given, for the shipment to be effected. In breach of this obligation, the defendants called on the performance bond on 14 January 1992 and in so doing the defendants were in repudiatory breach of contract. The plaintiffs were entitled to and did accept the defendants` repudiatory breach by their letter of 31 January 1992.Having done so they are entitled to treat themselves as discharged from the said contract. Accordingly, I grant the declarations sought and order that the defendants:

> (a) pay to the plaintiffs such sums by way of damages as may be assessed by the Registrar with interest thereon at 6% pa from date of writ;

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(b) repay the sum of US$95,150 forfeited under the performance bond with interest thereon at 6% pa from 15 December 1991; and

(c) pay the plaintiffs` costs in this action.

130 ***Order accordingly.***

S Rajendran J

Manjit Singh and Samuel Chacko (Manjit & Pnrs) for the plaintiffs
Tan Tee Jim and Leonard Goh (Allen & Gledhill) for the defendants

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