IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1997] SGCA 2

CA 107/1996

Between

China Resources (S) Pte Ltd

… *Appellant*

And

Magenta Resources (S) Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Contract — Discharge; Credit and Security — Performance bond

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

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

[1997] SGCA 2

CA 107/1996
Karthigesu JA; L P Thean JA; Yong Pung How CJ
13 January 1997

1 (delivering the judgment of the court):

2 In the court below the learned judge held that the respondents, to whom we shall refer hereafter as `the sellers`, had properly invoked the force majeure clause in the contract and accordingly the appellants, the buyers, had to wait the number of days specified in that clause for the shipment to be effected. Hence the buyers` call, within that period, on the performance bond furnished by the sellers was in breach of this obligation which amounted to a repudiatory breach of the contract which the sellers duly accepted. In the result the sellers were entitled to damages as may be assessed by the registrar with interest thereon at 6% pa from the date of the writ and to a refund of the sum forfeited under the performance bond also with interest thereon at 6% pa from 15 December 1991, that being the date of the forfeiture, and costs: see the High Court`s judgment at [1996] 3 SLR 62 at p 90.

3 The buyers being aggrieved by the High Court`s judgment have appealed to this court and they have confined their appeal to three specific questions, framed in their written case as follows:

4 (a) whether there was a force majeure event at the place (their emphasis) in the former USSR where the goods were to be obtained and/or shipped from;

5 (b) whether the respondents (sellers) have proved that they were prevented or hindered from shipping the goods because of the chaos in the USSR; and

6 (c) whether the respondents have satisfied all the requirements of the force majeure clause in the contract to be excused from performance.

7 By a contract in writing dated 12 October 1991 the sellers agreed to sell to the buyers 50,000 metric tons of `prilled urea of USSR origin` (the urea) packed in polypropylene bags, each containing 50 metric tons of the urea, c & f China for discharge at Huangfu or Shekou ports to be designated by the buyers `not less than 10 days from the scheduled shipping date`. The port of loading was not stated in the contract; this clause in the contract reads: `to be advised by the seller after receipt of L/C`. However, subsequently the parties agreed that shipment from `USSR or Eastern European Ports` was allowed due to possible congestion at USSR ports. Transshipment was not allowed but partial shipments were provided that the first shipment of 25,000 metric tons was effected within 30 days upon receipt of a workable letter of credit by the sellers` bankers. The latest date for the first shipment was 30 November 1991.

8 The other salient points of the contract, material to this appeal, were:

9 (i) Shipping marks: This clause provided that in the event the buyers wanted the bags of urea marked with special shipping marks the buyers were to provide the sellers with the appropriate markings 45 days before the scheduled

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shipping date failing which the sellers will effect the shipment without markings or with the manufacturer`s standard markings.

10 (ii) Payment: The buyers were required within three banking days after the signing of the contract to open an irrevocable transferable letter of credit for the full purchase price in United States dollars payable at sight to the sellers at the sellers` bank against presentation of the shipping documents stipulated in the contract.

11 (iii) Restriction of vessels: Vessels sailing under the flags of Taiwan, South Africa, South Korea or Israel were not acceptable to the buyers.

12 (iv) Performance Bond: The clause provided as follows -

> *The seller shall provide a performance bond (bank to bank) for an amount equivalent to approximately 2% of the L/C value on receipt of the workable L/C which shall cover performance of delivery of the goods in accordance with specifications as stated in this contract.*

13 The amount of the performance bond was US$95,150.

14 (v) Force Majeure: This clause reads as follows -

> 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 (for) the non-performance of this contract in case of force majeure, but, when force majeure happens, the seller must immediately send to the buyer within 30 days thereafter by registered airmail, certificate of the 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

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> notify the seller immediately 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.

15 In the context of para D of the force majeure clause we will note that the contract contains an arbitration clause which provides for the resolution of disputes `by friendly negotiations` failing which the parties agree to submit to arbitration firstly by the International Chamber of Commerce, Singapore and failing that to the ICC in London.

16 It is not disputed between the parties that the buyers were aware that the sellers were obtaining the urea from their suppliers in Switzerland and that the sellers knew that the buyers were on-selling the urea to other parties in China.

17 The buyers opened the letter of credit in favour of the sellers at the sellers` bank in Singapore on 21 October 1991 and expiring on 26 December 1991. It provided that shipment was from `USSR or Eastern European Ports` and was to be effected `after 7 November 1991 but not later than 30 Nov 91`. The letter of credit also provided that shipment must not be effected `under the flags of Taiwan, South Africa, South Korea or Israel`.

18 The buyers wanted the bags of urea specially marked with their shipping marks and provided the sellers with the necessary stencils for this purpose on 28 October 1991. In view of the late provision of the stencils for the markings the sellers requested that the latest shipment date stated in the letter of credit be extended to 14 December 1991. This was agreed to by the buyers and

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accordingly the letter of credit was amended to provide that the last date for the first shipment of 25,000 metric tons of urea be the 14 December 1991. The validity of the letter of credit was also extended to 9 January 1992.

19 A workable letter of credit thus amended was given to the sellers on 28 October 1991. On 29 October 1991 the buyers wrote to the sellers that they, the buyers, were under pressure from their end buyers to cancel the contract unless the sellers posted the performance bond forthwith as required by the contract. In the event the sellers provided the performance bond for US$95,120 on 30 October 1991.

20 On 1 November 1991 despite the fact that the performance bond had already been furnished the buyers purported to cancel the contract on the ground of the late provision of the performance bond contending that their end buyers in China had purported to do the same. The sellers protested but said they would approach their suppliers. On 15 November 1991 the buyers made a second attempt to cancel the contract. Again the sellers approached their suppliers in Switzerland and after some negotiations, all round, the buyers agreed to `go ahead` with the contract on 19 November 1991. However the buyers refused any further extension of the last date for the first shipment from 14 December 1991 on account of the time lost during this period of uncertainty between 1 and 19 November 1991.

21 The sellers were disappointed that their request to extend the shipping date from 14 to 22 December (eight days) was refused and expressed their regret in a telex to the buyers on 27 November 1991 and concluded by saying that they would do their best to ship the urea by 14 December 1991 failing which the sellers trusted that the buyers would accept a reasonable delay. The buyers did not care to respond.

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22 It is common knowledge that great political changes were taking place in the USSR and that the United Soviet Socialist Republic was beginning to disintegrate many months before the USSR formally ceased to exist as a political entity on 9 December 1991. Notwithstanding the position the buyers took at the trial it can safely be said that the buyers do not now dispute the break-up of the USSR but question the impact it had or would have had on the performance of this contract by the sellers.

23 However, the first intimation the turmoil in the USSR was having on the performance of this contract by the sellers came in the sellers` fax to the buyers on 2 December 1991. The sellers explained that whilst awaiting the result of the referendum held recently to decide on the future of Russia and the Ukraine no one was prepared to be committed with the result that everything was at a standstill. In fact the sellers` supplier had gone to the USSR to try and finalise everything and the sellers believed that loading would commence during the week. We should mention that by this time the buyers were aware that the supply of urea was from factories in the Ukraine and that the loading port was the Black Sea port of Novorossisk.

24 The sellers` fax to the buyers of 2 December 1991 was followed by the fax of 11 December by which the sellers informed the buyers that loading of the first shipment of 25,000 metric tons of urea will commence on 17 December 1991 at the port of Novorossisk and that the carrying vessel was expected to sail for Huangfu/Shekou, China on 25 December 1991. The sellers could not give the name of the carrying vessel as the message they had received was unclear but they were able to say that the vessel was chartered by World Shipping Corporation, Millneck, New York, and that she was registered with the Protection and Indemnity Club of Charters Mutual Indemnity Association, Bermuda. The fax ended with the following message:

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> *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.*

25 The buyers did not respond or comment on the sellers` fax of 11 December. It was followed two days later by another fax to the buyers dated 13 December 1991. This is an important fax and we set it out in full in plain English transcribing the abbreviations as best we can:

> *Our supplier has just confirmed that due to the recent and continuing political upheavals in the USSR, leading to the decentralization of local authorities and formation of Independent Republics the said urea could not be transported and exported as originally planned under the previous licence(s) and permit(s) ie in early December. The previously issued licence(s)/permit(s) for the urea apparently were no longer recognised or accepted at face value by the various local authorities, who required new licence/permits to replace or amend/validate the old licence(s) and permit(s). This caused immense transportation problem and has resulted in the port of loading to be changed more than once and therefore exceedingly difficult to confirm the vessel. Tremendous communication problems in and out of USSR was also compounded the delay.*
>
> *The upheavals and changes in licence/permits stopped and delay all transportation and shipping arrangements that had been made for early Dec 91 which had the effect of halting our urea shipment. We have been assured by our supplier that they are sparing no efforts including expense to fulfill the contractual obligations.*
>
> *We therefore give you notice under clause 17 of our contract and declare `force majeure`. As of this date, all terms of above contract have been fulfilled by us except the shipment date, which we expect will be on or before 3rd Jan 1992.*
>
> *We would appreciate your full co-operation in view of the unforeseen problems indicated above and would be obliged if you could kindly amend the L/C accordingly.*

26 Again the buyers did not respond or comment. In the meanwhile the sellers had got more information of conditions inside the USSR with particular reference to the fertilizer trade from the Fertilizer Market Bulletin dated 18 December 1991 they had received from their associates in the United Kingdom. They communicated this information to the buyers by fax on 20 December 1991 and also said:

> *Our same UK associates has also confirmed separately that it is now known and accepted in the International fertilizer community that `force majeure` is in progress in the USSR and that all shipments of urea from there are pending until 18th January 1992 when certain decisions and regulations will be made known.*

27 The buyers did not respond until 23 December when in a curt telex to the sellers they referred to the sellers` message of 13 December and said that they agreed to the shipment on 3 January 1992 but reserved their rights to sue for damages and loss. On the same day the buyers called on the performance bond. Their stated reason to the bank was that the sellers failed to deliver the urea aboard the carrying vessel `on or before the last shipment date stipulated in the related documentary credit`.

28 The last shipment date stated in the letter of credit, it will be remembered, was 14 December 1991. When the sellers protested to the buyers for this unjustified act on their part, discussions ensued to resolve the matter. The buyers disclosed that their real reason for calling on the performance bond was because it was due to expire on 26 December 1991 and this was a sure way of getting the sellers to extend the validity of the performance bond. This was also the answer given by Sam Chong Keen, the managing director of the buyers in his evidence at the trial. The learned judge accepted this answer (see p 77B) but we are somewhat surprised that such a duplicitous reason could be given when it had been stated `with full corporate responsibility and liability` that the

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reason for the call was the sellers` failure to ship the urea by the last shipment date stipulated in the letter of credit. We should have thought a simple request to extend the validity of the performance bond in the light of the sellers having declared force majeure would have been amply sufficient.

29 Anyhow, the upshot of the discussions between the sellers and the buyers was that the call was withdrawn and the validity of the performance bond was extended to 8 March 1992 but unfortunately for the sellers their position was not made clear that the validity of the letter of credit would be similarly extended. When the sellers did ask the buyers on 31 December 1991 to extend the letter of credit which was due to expire on 9 January 1992 to 8 March 1992, the buyers flatly refused.

30 It will be remembered that by para B of the force majeure clause the sellers were required to send to the buyers a `certificate of force majeure issued by a competent government authority at the place where the force majeure occurred` within 30 days of the declaration. The sellers due to the conditions then obtaining within the former USSR had difficulty in obtaining such a certificate and explained their difficulty to the buyers on 7 January 1992. However they were able to obtain a letter from the USSR Embassy in Singapore which referred to the political situation in the former USSR and explained the serious problems that had arisen with the issue or re-issue of licences and permits for the movement of goods within the former USSR which could disrupt and even halt previously made transportation arrangements. This letter dated 13 January 1992 was sent to the buyers the same day.

31 Notwithstanding the sellers` declaration of force majeure and notwithstanding the letter from the USSR Embassy in Singapore dated 13 January 1992 being sent to the buyers within 30 days of the sellers` declaration,

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the buyers called on the performance bond on 14 January 1992 for the reason that the sellers had failed to deliver the urea on 3 January 1992 in accordance with the terms and conditions of the contract.

32 The sellers` protestations at the unwarranted act of the buyers was not heeded and on 16 January 1992 the buyers confirmed that they had called on the performance bond because:

33 (a) the sellers had failed to deliver the urea by the latest shipment date of 3 January 1992; and

34 (b) the letter from the USSR Embassy in Singapore dated 13 January 1992 was not in accordance with para B of the force majeure clause which required a certificate from a competent government authority in the place where the force majeure occurred.

35 Undaunted by the buyers` actions the sellers still persevered and obtained two further certificates from Moscow. One was in Russian with an English translation emanating from the staff of the USSR President, Moscow, Kremlin and the other in English from the deputy director, Scientific Technology Centre. Both letters were dated 18 January 1992 and both were to the same effect and spoke of the transportation difficulties that had arisen due to the break-up of the USSR. These letters too were sent to the buyers. They were unmoved and maintained their justification in calling on the performance bond. The sellers maintained that the buyers were in repudiatory breach of the contract and by their letter of 31 January 1992 accepted the breach and commenced these proceedings.

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36 The question for the court below was whether the buyers had breached the contract when they called on the performance bond on 14 January 1992. The sellers case was that the buyers had, firstly because they had mistakenly believed that a new shipment date had been agreed, it being 3 January 1992 and, secondly, in any event, the performance of the contract by the sellers had been suspended by their declaration of the occurrence of a force majeure event pursuant to the force majeure clause in the contract on 13 December 1991 and that force majeure event was still operative on 14 January 1992.

37 The learned judge found that a new shipping date had been agreed and that it was 3 January 1992. In the report of his judgment at p 77E he said:

> *I find the facts to be that in response to the requests by the plaintiffs (sellers) to have the last shipment date stipulated in the LC extended, the defendants (buyers) 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 obligation to effect the shipment and the defendants would have been entitled to call on the performance bond.*

38 With the greatest respect to the learned judge this finding is not supported by the documentary evidence in this case. In the first place there were only two requests from the sellers to extend the date for the first shipment stipulated in the letter of credit. It will be remembered that the date for the first shipment stipulated in the letter of credit was 30 November 1991 (see para 3 above). The first request to extend this date followed the late instructions for the bags of urea to be specially marked with the buyers` shipping marks to which the buyers agreed and accordingly the date for the first shipment was extended to 14 December 1991 (see para 7 above). The second request, which was flatly

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refused, followed the two attempts by the buyers to cancel the contract (see paras 9 and 10 above).

39 There was another request but this concerned more specifically the extension of the validity of the letter of credit which was due to expire on 9 January 1992 and only incidentally, the shipping date. This followed the buyers` first call on the performance bond on 23 December 1991 which the buyers, following discussions, agreed to and did withdraw and the validity of the performance bond was extended by the sellers to 8 March 1992 (see paras 16, 17 and 18 above). The request was made on 31 December 1991 and was refused. We have not referred to the documentary evidence regarding this request and the refusal before and should do so now.

40 On 31 December 1991 the sellers faxed the buyers as follows:

> *We refer to the above and your agreement to extend the validity of our performance bond to 8th March 1992.*
>
> *Please also arrange to amend your L/C validity date, which is due to expire 9th January 1992, and shipment date accordingly.*
>
> *Things have closed down in Europe and the new Commonwealth of Independent States (formerly USSR) for the holiday season.*
>
> *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 stabilized more over there.*

41 This fax hardly suggests to us that the sellers by their fax to the buyers dated 13 December 1991 (para 14 above) had offered to ship the urea by 3 January 1992. We will refer to this question again later but this is how the buyers and the learned judge, for that matter, appear to have understood it. The buyers replied, also on 31 December 1991, as follows:

> *As per our tlx 612/T dd 31 (should be 23) Dec 91, v agreed to accept yr rqst fr shipmt extension till 03 Jan 92. H/ever v wll only*

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> *consider any further rqst fr extension of L/C if there are signs that shipmt wll 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.*

42 Again the buyers` reply, it seems to us, does not rule out further extensions of the shipping date but seems to indicate that extension will be given and the letter of credit extended when firm shipping dates are confirmed, otherwise it is a waste of time. It will be noted that in evidence at the trial the buyers` witnesses in explaining their telex said that each time the letter of credit is extended it will cost them money and saw no point in extending the letter of credit and with it the shipping date unless it was firmly known when the urea will be shipped. However, more of this later.

43 It is clear from what we have said in paras 25, 26 and 27 above that up to 13 December 1991, when the sellers declared that a force majeure event had occurred `which had the effect of halting our urea shipment`, the sellers had made no request to extend the shipping date from the agreed date of 14 December 1991. In this context the sellers went on to say that all the terms of the contract have been fulfilled except for the shipment date which they expected will be on or before 3 January 1992. In our judgment this is not an offer to ship the urea `on or before 3 January 1992` but a statement of their expectations having regard to the force majeure event they had declared by their fax to the sellers of 13 December 1991. The sellers` fax of 13 December 1991 must be seen, in its own context and in the context of all preceding faxes and telexes and also in the context of the prevailing conditions in the USSR.

44 We are in no doubt that the learned judge misread the faxes and telexes passing between the parties or else he would not have concluded that the buyers

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agreed to the shipping date of 3 January 1992 `in response to the requests by the plaintiffs (sellers) to have the last shipment date stipulated in the LC extended`. His finding (para 24 above) in our considered judgment was a wrong evaluation of the documentary evidence we have discussed in the foregoing paragraphs of this judgment.

45 The question of the shipping date can also be approached in another way. The last shipping date agreed by the parties was 14 December 1991. The first indication that the sellers were not going to keep this date came in the sellers` fax to the buyers on 11 December 1991 (see para 13 above) in which the sellers said that loading will commence on 17 December 1991 and the carrying vessel will sail from the port of Novorossisk on 25 December 1991. In the same fax the sellers gave fore-warning of a force majeure event developing. Clearly the sellers were not going to keep the agreed sailing date of 14 December 1991. Yet, the buyers neither protested nor called on the performance bond. When they did call on the performance bond on 23 December 1991, the very day they said they agreed to the shipping date of 3 January 1992, it turned out that they were not really concerned with the sellers` inability to keep to the agreed shipping date but because it was a sure way of getting the sellers to extend the validity of the performance bond which was due to expire on 26 December 1991.

46 Clearly the sellers were in breach of the contract when they failed to ship the urea by 14 December 1991 and equally clearly the buyers waived the sellers` breach when they withdrew their call on the performance bond and agreed to its validity being extended to 8 March 1992. There being no agreed shipping date under the contract what then are the respective obligations of the parties? On the sellers` part it would be to ship the urea within a reasonable time having regard to all the circumstances and on the buyers` part, if they wanted to tie the

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sellers down to a shipping date, to name a reasonable date having regard to all the circumstances. What is reasonable in each case is a question of fact for the court to find. These are settled propositions of law for which no authority need be cited.

47 In our view it would be unreasonable and against the weight of the documentary evidence to read the sellers` fax of 13 December 1991 (para 14 above) as a commitment or an offer to ship the urea `on or before 3 January 1992` in view of their declaration of an occurrence of a force majeure event and notice thereof to the buyers in the same fax. It was an event of such magnitude as to disrupt transportation throughout the USSR and was universally described as `the disintegration of the Soviet Union` and which the only expert witness to give evidence at the trial, Dr Gilbert for the sellers, said was `at par with war` which `fortuitously did not explode into war`. The whole course of dealing between the parties from the date of the contract onwards must be seen in the context of the developing political situation in the then USSR. In our judgment it would be unreasonable to find, as that is what the learned judge found, that having regard to the then situation in the USSR the sellers could on 13 December 1991 have anticipated the situation in the USSR returning to normal before 3 January 1992, that they committed themselves and offered to ship the urea `on or before 3 January 1992.`

48 It follows that once the shipment date of 14 December 1991 had passed and no other shipment date had been agreed between the parties for the first shipment of the 25,000 metric tons of urea, the buyers` call on the performance bond on 14 January 1992 for the reason that the sellers had failed to ship the urea on 3 January 1992 in accordance with the terms and conditions of the contract was a repudiation of the contract which the sellers were entitled to and did accept on 31 January 1992.

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49 We will now deal with the question whether the performance of the contract by the sellers had been suspended by their declaration of the occurrence of a force majeure event pursuant to the force majeure clause in the contract. This was the buyers` principal argument before us. The learned judge has dealt with it very fully in his judgment from pp 77-90. We will therefore confine ourselves to the three questions on which learned counsel premised his arguments. We have set them out at para 2 above.

50 The learned judge made the following findings:

51 (i) that the force majeure clause extended to situations such as war, military action, etc and 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 Clause 17A (ie para A of the force majeure clause)` - see p 85I to 86B of the judgment);

52 (ii) that the sellers had discharged their burden to show that their failure to ship the urea was on account of the force majeure situation then prevailing in the USSR as a result of the disintegration of the USSR - see p 86F to G of the judgment;

53 (iii) that the sellers` telex to the buyers dated 13 December 1991 (para 14 above) complied with the requirements of para B of the force majeure clause and that it was an immediate notification of the force majeure - see p 90F of the judgment;

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54 (iv) that the certificate of force majeure issued by the embassy of the USSR in Singapore and served on the buyers (para 19 above) complied with the force majeure clause - see p 90G of the judgment.

55 We entirely agree with these findings.

56 The first of the buyers` contentions is that the evidence led by the sellers did not show that the force majeure event relied on had affected the place, with the emphasis on the place, where the urea was to be obtained from or the port from which it was to be shipped. What was being contended was that it was not shown that the factory in the Ukraine where the urea was processed had to shut down or that the port of Novorossisk had ceased to operate and that it was impossible to transport the urea from the factory in the Ukraine to the port of Novorossisk because of the force majeure event relied on. Admittedly in the normal kind of force majeure situation like a storm or a fire or a strike or a lock-out, it would be crucial for such evidence to be given. However, the force majeure event relied on in this case, of which there was the convincing evidence of Dr Gilbert, was that from at least mid-1991 to the break-up of the former USSR the clamour of the states which constituted the former USSR for their independence from Moscow and for control of such matters as banking, customs and shipment licences intensified, creating tension between Russia and the states and a `war-like` situation arose which seriously disrupted communications and transportation and was not confined to any one place but pervaded the whole of the then USSR. Even after the formal dissolution of the USSR on 9 December 1991 and the formation of the Commonwealth of Independent States of which the Ukraine was a member the situation did not abate as the Ukraine wanted the control of the Soviet Black Sea Fleet which Russia resisted and there was further confrontation and a threat of war between Russia and the Ukraine. The Ukraine was where the factory processing the urea

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was situated which had to be transported to Novorossisk, a Black Sea port; to get to Novorossisk the Crimea had to be crossed as this was where the Soviet Black Sea Fleet was located.

57 All this comes out clearly from the evidence of Dr Gilbert, whom the learned judge, rightly, accepted as being a competent witness to testify on these matters. His evidence has been fully discussed by the learned judge to which reference may be made at pp 79-82 of the judgment. Hence there is no substance in this contention.

58 The second issue raised by the buyers, whether the sellers have proved that they were prevented from shipping the urea because of the chaos in the USSR really begs the question. Again, the evidence of Dr Gilbert specifically referred to the feud between Russia and the Ukraine over such matters, among others, as shipping licences. Licences previously issued by the USSR were not recognised in the Ukraine or in Russia. The Straits Times of 16 December 1991 reported the then British Foreign Secretary, Mr Douglas Hurd, as saying that the republics in the disintegrating Soviet Union were `staring into an abyss` beyond which could be years of bankruptcy and bloodshed. Dr Gilbert who really is a political and economic affairs analyst commented on this statement in his evidence as meaning, in practical terms, that hundreds of thousands of workers did not get paid, had no jobs, went on wild cat strikes and that this would have been a serious detriment of regular business activity. What more proof, what more evidence does one need? The court must take a practical approach having regard to all the circumstances. It would, in our judgment, have been unrealistic for the court to have insisted on direct evidence from witnesses from the factory in the Ukraine and the port of Novorossisk.

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59 A further point was raised that the sellers had made no attempts to overcome the force majeure event by obtaining the urea and shipping it from an Eastern European port. There was no obligation in this case for the sellers to have explored Eastern European markets for `urea of USSR origin` so as to arrange shipment from an Eastern European port. If it was not possible because of the transportation problems to get the urea from the factory in the Ukraine to the Black Sea port of Novorossisk it would have been equally impossible to get the urea to an Eastern European port. So the alternative is for the sellers to buy 25,000 metric tons of `urea of USSR origin` in the Eastern European markets. Now even if `urea of USSR origin` in the large quantity of 25,000 metric tons was available in the Eastern European markets, the sellers had no obligation to purchase it for shipment to the buyers in mitigation for the simple reason that their contract with the buyers was c & f and it would be too great a risk to ship such a large quantity of urea without insurance and furthermore it would be too much to expect the sellers to take out the insurance themselves. The cases cited to us by buyers` counsel were all cif contracts and are distinguishable on this ground alone. In our view this argument has no merit.

60 The final issue raised by the buyers is that the certificate from the embassy of the USSR in Singapore was not the certificate contemplated by para B of the force majeure clause and hence all the requirements of this provision had not been satisfied. It was even submitted that what para B required was for the certificate issued by a competent government authority to be telexed or cabled immediately on the occurrence of the force majeure event and then within 30 days to send the certificate itself by registered airmail. We cannot agree that this is a correct reading of the paragraph. Obviously what is intended is that on the occurrence of a force majeure event notice is given immediately by telex or cable. This is followed by a certificate issued by a competent

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government authority to support the declaration and this must be done within 30 days and sent by registered airmail. This seems clear and is the only sensible meaning that can be given to the inelegant wording of the paragraph.

61 Surely it was the very reason that prevented the sellers from shipping the urea that also prevented the sellers from getting the certificate of a competent government authority at the place where the force majeure occurred within the 30 day limit. In the circumstances the sellers did the next best thing. They obtained the certificate from the embassy of the USSR in Singapore. One must not be too technical but must approach the problem from a practical point of view and with regard to the underlying purpose or principle of the provision in question. The object of the certificate is to back up the contention of the party declaring a force majeure event. Admittedly the certificate is intended to be evidence of the force majeure event declared but not in proof of the force majeure event. For this reason too the certificate need not descend into details. Para B of the force majeure clause in this contract is not a conclusive and exclusive evidence provision. In this connection we refer to and respectfully adopt Lord Mustill`s observation in ***Hoecheong Products Co Ltd v Cargill Hong Kong Ltd*** [1995] 1 Lloyd`s Rep 584 at p 588 quoted by the learned judge at p 89 of the report of his judgment.

62 If there was a contention between the parties, as indeed there was, whether or not a force majeure event had occurred which suspended the performance of the contract, the contract itself provided the means for resolving it. There was an arbitration clause which called for `friendly negotiation` in the first place (para 4 above). Furthermore para D of the force majeure clause also provided that in the event the force majeure continued for more than 120 consecutive days, the parties were to `discuss through friendly negotiation as soon as possible their obligation to continue to perform under the terms and

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conditions of the contract`. There was no justification for the buyers peremptorily to call on the performance bond in the way they did. Such an act was as clear a repudiation of the contract as there could be and the sellers rightly accepted the repudiation.

63 In our judgment this appeal is misconceived and without merit. Accordingly it is dismissed with costs. The security deposit will be paid out to the respondents` solicitors to account of their costs.

64 Appeal dismissed.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Tan Tee Jim and Leonard Goh (Allen & Gledhill) for the appellants
Davinder Singh (Drew & Napier) and Samuel Chacko (Manjit & Partners) for the respondents

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