THE CONTRACT

1.1 WE FIND the following material terms:-

"COMMODITY:
BRAZILIAN SOYABEAN IN BULK

QUANTITY
16/17,000 MT
10% MORE OR LESS AT BUYERS' OPTION AND AT CONTRACT PREMIUM

SHIPMENT:
DURING JULY 1-20 2004 AT BUYERS' CALL
BUYERS TO GIVE SELLERS 10 DAYS PREADVANCE FOR VESSEL'S ETA LOADING PORT AND HER READINESS TO LOAD

PRICE:
135 U.S. CENTS PER BUSHEL UNDER CBOT JULY 2004 SOYABEANS (SNO4) FOB STOWED/TRIMMED ONE SAFE BERTH [NAMED BRAZILIAN PORT] ON SELF TRIMMING BULK CARRIER.
BRAZILIAN FIXING TO APPLY.
BUYERS SHOULD TRY TO FIX THE FUTURES LATEST UPON ARRIVAL OF VESSEL TO LOADPORT. HOWEVER ARE ALLOWED TO ROLL ANY UN-PRICED POSITION OVER ONCE FROM CBOT SN4 FUTURES INTO SU4 FUTURES, LATEST ON FIRST NOTICE DAY I.E. ON JUNE 30TH 2004.
The Futures Position has to be closed latest by the first notice I.E. by July 30TH 2004.

PAYMENT:
BY UNCONDITIONAL BANK GUARANTEE ISSUED OR CONFIRMED BY BANK CREDIT, AND PAYABLE 100% AT SIGHT AGAINST FAX COPIES OF: ………..
THE UNCONDITIONAL BANK GUARANTEE TO BE OPENED BY BUYERS AND TO BE RECEIVED FULLY WORKABLE FOR SELLERS PRIOR TO COMMENCEMENT OF LOADING.

OTHER TERMS AND CONDITIONS:
ALL OTHER TERMS AND CONDITIONS WHEN NOT STATED OR IN CONFLICT WITH THE ABOVE TO BE AS PER ANEC 41 INCLUDING FOSFA ARBITRATION RULES IN FORCE AT THE DATE OF THIS CONTRACT."

The Contract was signed by both parties.

1.2 By virtue of the incorporation of the FOSFA Rules of Arbitration and Appeal, the juridical seat of the arbitration is England.

THE FACTS
(All dates are 2004 unless otherwise stated)

2.1 On 30 June Sellers urgently requested Buyers' intentions for the open July/August Contracts.

2.2 On 8 July Sellers stated that they had rolled the unpriced position (121 contracts - basis 16,500 metric tons) from SN4 to SU4 and accordingly issued a Contract Addendum on the same date stating -
"Price to read:
Premium US$1.77 per bushel over CBOT September 2004 Soyabees (SU4) Fob stowed / trimmed one safe berth / [named Brazilian Port] on self trimming bulk carrier (basis 16.500 metric - 121 contracts).
Brazilian fixing to apply. (impling if Buyers fail to price in time Sellers to fix accordingly after giving notice to Buyers).
Buyers to fix the futures latest upon arrival of vessel to load port but latest by first notice day i.e. by July 30th 2004.

All other terms / conditions of the contract remain unchanged."

2.3 On 19 July Sellers wrote:

“We refer to contract no's [002] and [001] dated 4th June 2004.

In relation to [001], shipment is 1-20 July 2004, 10 days' pre-advice, ANEC 41 extension. No vessel has been nominated, nor guarantee opened. If your clients have not nominated a vessel, or claimed extension by 20th July, we consider that your clients will be in default of [001].[sic]”.

2.4 No reply was received to this message and therefore on 21 July Sellers stated that they had not received any vessel nomination nor any payment guarantee, nor any claim for extension pursuant to ANEC 41, and continued that as a result it appears to Sellers that Buyers are now in default of this contract and damages will be claimed accordingly.

2.5 Again no reply was received to this message and therefore on 2 August Sellers forwarded an invoice claiming an amount of US$1,067,715 as damages.

2.6 On 10 September Solicitors acting for Sellers claimed Arbitration and nominated an Arbitrator.

2.7 On 11 October the Solicitors acting for Buyers nominated an Arbitrator.

3.0 SELLERS' SUBMISSIONS

3.1 Sellers submitted that Buyers are in breach of their contractual obligations for two reasons: firstly Buyers failed to nominate a vessel within the contractual delivery period and secondly Buyers failed to open a fully workable Bank Guarantee.

3.2 The Contract required that Buyers were to give Sellers 10 days pre-advice of vessel's ETA at the loading port and the shipment position was 1-20 July at Buyers' call.

3.3 ANEC 41, Clause 10, states –

"In the event of any or all of the goods not being on board the vessel by the last day of the period of delivery, Buyer to claim extension of maximum 30 days."

3.4 FOSFA Contract No 4, Clause 11, provides for an extension of the delivery period as follows -

“EXTENSION OF DELIVERY: Buyers shall be entitled to an extension of the original contract delivery period not exceeding 15 days in which to provide suitable freight. Notice of such extension shall be dispatched to Sellers not later than the last day of the original contract delivery period.”

ANEC 41 does not define when the notice of such extension should be given to sellers; therefore the provisions of Clause 4 as incorporated into the Contract apply.

3.5 No notice claiming extension of the delivery period was received by Sellers and therefore on 21 July Buyers were in default of their obligation to nominate a vessel on which to load the cargo and the deadline by which they could claim extension had expired.

3.6 With regard to the second breach, the Bank Guarantee should be opened by Buyers prior to commencement of loading, therefore the last date on which the Bank Guarantee could be opened would be the last date on which loading could have commenced. As no extension to the delivery period was claimed, the last date at which loading could have been commenced was 20 July. No such Bank Guarantee was opened.
3.7 Therefore Buyers were in breach of both of these obligations under the terms of the Contract and are liable in damages.

3.8 In order to ascertain the loss suffered, firstly the contract price must be established.

3.9 The price of the cargo in the Contract was based on a premium under the futures price quoted on the Chicago Board of Trade for July 2004 (SNO4) ie US$1.85 per bushel under SNO4. The Contract required price fixing against July CBOT futures (SN4) and that Buyers will determine when the price is to be fixed, since this is the meaning of "Brazilian fixing to apply." If the Buyers have not fixed by 30 June 2004 the Contract will instead be priced against September futures.

3.10 The roll over of the unpriced portion, (here the entire quantity) from SN4 to SU4 was advised to Buyers on 8 July at a cost of US$3.12 per bushel. As a result the cost to Buyers of rolling forward was US$3.12 per bushel, which amended the contract price from US$1.85 per bushel under CBOT July 2004 to US$1.77 over CBOT September 2004. This is evidenced by the fax of 8 July and the Contract Addendum of the same date. Consequently the contract price was US$1.77 over September 2004 CBOT Soyabean futures. 

3.11 With regard to the estimated market price, Sellers produced evidence of the market value for Brazilian Soyabean sold on FOB terms for July 2004 shipment of US$0.01 per bushel under CBOT Soyabean September futures. The difference between the contract price and the value of the goods on the date of default is therefore US$1.76 per bushel. CBOT September is obviously the same for both and the premium is the only difference.

3.12 One metric ton is equivalent to 36.74541 bushels, which gives a price difference of US$64.71 per metric ton and this figure multiplied by 16,500 metric tons, the mean contract quantity, equates to a loss of US$1,067,715. Therefore Sellers claimed this amount in damages, together with interest and costs.

4.0 BUYERS’ SUBMISSIONS

4.1 Buyers submitted that they were not in breach as the obligation to open a Letter of Credit was stipulated to be “prior to commencement of loading”. At the time of termination of the Contract loading had not yet begun and Buyers were therefore still within time to open a Letter of Credit.

4.2 The Contract did not envisage that, in the event that Buyers had not fixed the price by 30 June, the Contract would be priced against September futures. On its true construction the Contract provided that Buyers had an option to price against September futures. Whether or not they chose to exercise that option was a matter for them.

4.3 Buyers did not in fact exercise that option, either before 30 June, or at all. Therefore there was no agreement between the parties for a roll over or for price fixing against September futures.

4.4 Alternatively, if the Contract did stipulate an automatic rolling over to price fixing against September futures, the Contract did not contain any provision which would allow Sellers to charge Buyers for that roll over.

4.5 In either event, Sellers’ fax of 8 July is not evidence of a binding amendment to the terms of the Contract.

4.6 Therefore Sellers are not entitled to any damages under this Contract.

5.0 SELLERS’ REPLY SUBMISSIONS

5.1 Sellers note that Buyers did not dispute that they were in default of this Contract but they dispute the quantum and the failure to open a Bank Guarantee. The non-performance of Buyers is admitted.

5.2 Sellers pointed out an error in their original Claim Submissions insofar that the contract price should have been US$1.35 a bushel under CBOT July 2004. The price can be calculated as the cost of rolling forward US$3.12, making the price of US$1.77 per bushel.

5.3 The failure to open a Bank Guarantee is not fundamental as Buyers were in default in any event from their failure to nominate a vessel. It remains a fact that Buyers failed to open a Bank Guarantee as required by the Contract. Buyers contend that as loading had not commenced at the time of termination of the Contract they were still within time to open a Bank Guarantee. Buyers should have commenced loading by the date of termination, and therefore should have opened a Bank Guarantee.
5.4 The Contract Addendum amends the contract price from July CBOT to September CBOT, by including in the premium the cost of changing from July to September CBOT futures. Buyers refer to this cost of changing as being a charge for the roll over, which is not provided in the Contract. This is in fact the standard method of amending the price when rolling forward from one month to another, taking into account the price difference between the different CBOT months. In this case it happened that the price was increased because of the market at the time. If Buyers had given instructions to roll forward at an earlier stage, this cost of rolling forward may have been far less.

5.5 Buyers could, and should as per Contract, have chosen when this roll over was done. They failed to do so, therefore Sellers rolled forward from July to September on 7 July at a cost of US$3.12 per bushel, leading to the 8 July fax and Addendum.

5.6 The Addendum was therefore a valid amendment to the Contract. There was no objection whatsoever made to this Addendum at the time and the failure to object shows that Buyers had acquiesced to the amendment. The Addendum represents the actual cost of rolling forward July - September so that the Contract could still be performed.

5.7 Sellers maintain their position that they were entitled to roll forward the contract price from July to September CBOT futures. Although Buyers deny that this was a valid method of pricing the Contract, they do not suggest an alternative method, so the Tribunal should find in favour of Sellers’ method. Buyers had not given instructions to either roll forward or fix the price by 30 June. They failed to give instructions, notwithstanding Sellers’ letter of 30 June urgently requesting instructions/intentions in relation to this Contract (see 2.1)

5.8 The Tribunal should therefore find that Sellers are entitled to roll forward position to keep the Contract alive, having no counter information from Buyers and no confirmation that Buyers intended to default rather than to perform. Sellers were entitled to do so on 8 July, having given Buyers a few days to cure their failure to give instructions and having expressly sought Buyers’ intentions regarding performance of the Contract.

5.9 If the Tribunal finds that it was inappropriate for Sellers to roll forward the futures position without instructions from Buyers, then the alternative is that the price would have been fixed on 1 July. This was the first opportunity that Sellers would have to fix the price failing instructions from Buyers to roll forward.

5.10 In those circumstances the July CBOT opening price on 1 July was US$9.10 per bushel. The contract price would therefore automatically be fixed at US$9.10 minus US$1.35, equals US$7.75 per bushel. This equates to US$284.78 per metric ton. This would be the fixed price for physical goods.

5.11 The date of default is 21 July. Opening price of August CBOT on 21 July was US$7.25 per bushel. The value of beans on 21 July was US$0.80 under CBOT August futures, giving a market price of US$6.45 per bushel, or US$237.01 per metric ton. Therefore the difference between the contract price of US$284.78 and the market price of US$237.01 equals US$47.77 per metric ton x 17,000 metric tons equals US$812,090.

6.0 FINDINGS

6.1 It is clear from the Submissions of both parties as to the matters that have to be determined, which are as follows:

a. Are Buyers in default? If so, then

b. What is the contract price?

c. What is the default date?

d. What is the default price?

We will deal with each in turn.

Are Buyers in default?

6.2 Sellers have submitted that Buyers are in default of the Contract firstly by failing to open the Bank Guarantee under the Payment Clause, and secondly by not nominating a vessel.
Buyers' defence was that the time of performance to open the Bank Guarantee had not yet arrived because it was due to be opened prior to the commencement of loading and loading did not commence. However, Buyers did not repudiate Sellers' submission regarding the failure to nominate a vessel.

WE FIND THAT on the evidence before us that no vessel was nominated during the period of 1-20 July 2004, nor was the Extension Clause contained in the Contract exercised by Buyers.

WE FURTHER FIND THAT Buyers were in default for failing to nominate a vessel to fulfil this Contract and the date of default is 21 July 2004.

We consider the question of the Bank Guarantee peripheral to this dispute in view of our above Finding.

Contract Price

Sellers have submitted that the price of the cargo was basis the futures price quoted on the Chicago Board of Trade for July 2004. The Contract required price fixing, which Buyers failed to do. Sellers therefore elected to roll forward the unpriced position from SN4 (July) to SU4 (September) at a premium of US$3.12 per bushel.

Buyers deny that Sellers had any entitlement to roll forward the futures position as this clearly was Buyers' option.

WE FIND THAT the Contract is quite clear: firstly, Buyers should try and fix the futures, latest upon arrival at load port; secondly, Buyers are allowed to roll forward any unpriced position, latest on 30 June 2004.

WE FURTHER FIND THAT the Contract does not give Sellers the option of rolling forward the position unilaterally, even though Buyers did not take any action.

WE FURTHER FIND THAT that the contract price is to be fixed as the CBOT opening price on 1 July 2004. Therefore the contract price is to be calculated in accordance with 5.10 above at US$284.78 per metric ton.

Date and Price of Default

We have found that the date of default is 21 July 2004 (6.5 above) and in accordance with the evidence before us the opening price for August 2004 CBOT on 21 July 2004 was US$7.25 per bushel. In accordance with the calculation at 5.11 above, the market price was US$237.01 per metric ton.

The Default Clause of the Contract stipulates that damages are to be calculated on the difference between the contract price and the actual or estimated market price, and based on the mean contract quantity, being 16,500 metric tons. This equates to damages amounting to US$788,205.00.

AWARD

WE AWARD THAT Buyers shall pay to Sellers immediately the sum of US$788,205.00 (Seven Hundred and Eighty-eight Thousand, Two Hundred and Five United States Dollars), together with interest thereon at 4.5% (Four and One Half per Cent) per annum or pro rata, compounded with three-monthly rests from 21 July 2004 to the date of payment of the Award.

WE FURTHER AWARD THAT the fees, costs and expenses of this Arbitration shall be for Buyers’ account. If Sellers shall have paid any or all such costs in the first instance, they shall be entitled to immediate reimbursement.

THIS AWARD WAS APPEALED AGAINST BY SELLERS

THE BOARDS APPEAL AWARD IS SET OUT BELOW
We the Board have considered the Appeal against Arbitration Award dated 26 July 2005, concerning a contract No 001 dated 4 June 2004 for 16/17,000 metric tons of Brazilian Soyabean FOB shipment 1-20 July 2004.

By the consent of the Parties this was a Documents Only Appeal for which the Board, as a preliminary matter, considered the necessity of a hearing and declared no requirement for a hearing and indeed meeting of the Board. The proceedings were therefore conducted, by consent, on a correspondence basis.

The juridical seat of the Arbitration is England.

1.0 THE CONTRACT

1.1 WE FIND the following material terms (Contract was signed by both parties):

“COMMODITY:
BRAZILIAN SOYABEAN IN BULK

QUANTITY
16/17,000 MT
10% MORE OR LESS AT BUYERS’ OPTION AND AT CONTRACT PREMIUM

SHIPMENT:
DURING JULY 1-20 2004 AT BUYERS' CALL
BUYERS TO GIVE SELLERS 10 DAYS PREADVICE FOR VESSEL'S ETA LOADING PORT
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STOWED/TRIMMED ONE SAFE BERTH [NAMED BRAZILIAN PORT] ON SELF TRIMMING
BULK CARRIER.
BRAZILIAN FIXING TO APPLY.
BUYERS SHOULD TRY TO FIX THE FUTURES LATEST UPON ARRIVAL OF VESSEL TO
LOADPORT. HOWEVER ARE ALLOWED TO ROLL ANY UN-PRICED POSITION OVER
ONCE FROM CBOT SN4 FUTURES INTO SU4 FUTURES, LATEST ON FIRST NOTICE DAY
THE FUTURES POSITION HAS TO BE CLOSED LATEST BY THE FIRST NOTICE I.E. BY
JULY 30TH 2004.

PAYMENT:
BY UNCONDITIONAL BANK GUARANTEE ISSUED OR CONFIRMED BY BANK CREDIT, AND
PAYABLE 100% AT SIGHT AGAINST FAX COPIES OF: ...........

... THE UNCONDITIONAL BANK GUARANTEE TO BE OPENED BY BUYERS AND TO BE
RECEIVED FULLY WORKABLE FOR SELLERS PRIOR TO COMMENCEMENT OF LOADING.

OTHER TERMS AND CONDITIONS:...
ALL OTHER TERMS AND CONDITIONS WHEN NOT STATED OR IN CONFLICT WITH THE
ABOVE TO BE AS PER ANEC 41 INCLUDING FOSFA ARBITRATION RULES IN FORCE AT
THE DATE OF THIS CONTRACT.”

2.0 THE FACTS

As stated and FOUND at First Tier, and undisputed:
(All dates are 2004 unless otherwise stated)
2.1 On 30 June Sellers urgently requested Buyers' intentions for the open July/August Contracts.

2.2 On 8 July Sellers stated that they had rolled the unpriced position (121 contracts - basis 16,500 metric tons) from SN4 to SU4 and accordingly issued a Contract Addendum on the same date stating -

"Price to read:
Premium US$1,77 per bushel over CBOT September 2004 Soyabees (SU4) Fob stowed / trimmed one safe berth / [named Brazilian Port] on self trimming bulk carrier (basis 16,500 metric - 121 contracts).
Brazilian fixing to apply. (implying if Buyers fail to price in time Sellers to fix accordingly after giving notice to Buyers).
Buyers to fix the futures latest upon arrival of vessel to loadport but latest by first notice day i.e. by July 30th 2004.
All other terms / conditions of the contract remain unchanged."

2.3 On 19 July Sellers wrote:

"We refer to contract no's [002] and [001] dated 4th June 2004.
In relation to [001], shipment is 1-20 July 2004, 10 days' pre-advice, ANEC 41 extension. No vessel has been nominated, nor guarantee opened. If your clients have not nominated a vessel, or claimed extension by 20th July, we consider that your clients will be in default of [001].[sic]".

2.4 No reply was received to this message and therefore on 21 July Sellers stated that they had not received any vessel nomination nor any payment guarantee, nor any claim for extension pursuant to ANEC 41, and continued that as a result it appears to Sellers that Buyers are now in default of this contract and damages will be claimed accordingly.

2.5 Again no reply was received to this message and therefore on 2 August Sellers forwarded an invoice claiming an amount of US$1,067,715 as damages.

2.6 On 10 September Solicitors acting for Sellers claimed Arbitration and nominated an Arbitrator.

2.7 On 11 October the Solicitors acting for Buyers nominated an Arbitrator.

3.0 SUBMISSIONS

3.1 While Buyers initiated the appeal process in the normal course of procedural events with proper notice dated 23 April 2005, it was through their Submissions dated 13 September 2005, and Sellers response, that has led to effectively a Consent Agreement.

3.2 It is Buyers’ Submission that whereas Arbitration Award dated 26 July 2005 awarded in Sellers’ favour US$788,205.00 together with interest and costs, coming out of a default date of 21 July 2004, they contend the amount of damages should be US$499,620.00 arising out of the price mechanism fixed by reference to the price of July Soyabees at close of trading on 14 July 2004 (and not 21 July 2004).

3.3 Sellers, by their above mentioned response, a faxed letter dated 26 September 2005, agreed that this recalculation of damages will refer to the CBOT price at close on 14 July 2004. The Parties therefore agree the level of damages before the Board.

Interest

3.4 Sellers have argued that the compound interest rate of 4.5% per annum with 3 monthly rests from the 21 July 2004 up to the date of payment, as per First Tier, should be maintained.

3.5 Buyers have concurred with Sellers' submissions.

Costs

3.6 Buyers set out their cost arguments in their Rejoiner dated 31 October 2005 and have stated:

a. The Appeal Board should make no order as to the costs of the First Tier proceedings:
i. It is true that Sellers succeeded to the extent that they obtained a substantial Award.

ii. However they failed on the key issue of ‘roll over’ and the Award they will ultimately obtain is worthless than half the sum that they were originally claiming.

b. The Appeal Board should Award Buyers their costs of the Appeal:

i. The First Tier Award was wrong – as Sellers admit.

ii. If the Appeal Board makes the Award that Buyers and Sellers now jointly seek, Buyers’ Appeal will have succeeded in full.

3.7 Sellers had previously stated that as Buyers had not put forward their appeal calculation to the Tribunal nor did they respond at all to Sellers’ calculation put forward in Reply Submissions at First Tier, or make an offer payment of the US$499,620.00 amount (the admitted default), thus forcing the arbitration process, they, Buyers, should pay all the costs of the First Tier and of the Appeal, including legal costs.

4.0 FINDINGS

4.1 The Parties have agreed that the only issue before the Board and to be decided upon by the Board members in this case relates to the contract price and the subsequent level of damages payable under the Default Clause; the default for failing to nominate a vessel to fulfil this Contract being admitted by Buyers and both the default date and the estimated market price on the default date not being contested by either party. Facts of the case are not disputed.

4.2 As Buyers have argued and Sellers have agreed, the price should have been fixed by reference to the price of July soyabean CBOT futures at the close of trading on 14 July 2004. Therefore, WE FIND THAT the Contract Price was the CBOT July futures contract price at the close of trading on 14 July 2004 minus US$1.35 per bushel.

4.3 The closing price of the CBOT July futures on 14 July 2004 (as agreed by the Parties) was US$8.624 per bushel. Therefore, WE FIND THAT the Contract price was US$7.274 per bushel (US$8.624 – US$1.35) or US$267.29 per metric ton.

4.4 As the agreed market price on the default date (14 July 2004) was US$237.01, the damages payable under the Default Clause amount to US$30.28 per metric ton (US$267.29 – US$237.01). Based on the mean contract quantity of 16,500 metric tons, WE FIND AND HOLD THAT the total damages payable under the Default Clause are US$499,620.00 (16,500 metric tons X US$30.28 per metric ton).

Costs and Interest

4.5 Sellers have laid claim to recovery and/or allocation of costs, including legal costs, and interest on the damages.

4.6 Dealing with each in turn, Buyers’ admitted default led to the dispute resulting in the arbitration. The costs associated with the First Tier follow the event and are so awarded, as set out below.

4.7 Buyers have initiated this Appeal, and, as declared by us, succeeded. Normally the costs would follow that event, HOWEVER WE FIND THAT the Appeal was a direct consequence of Buyers’ inactivity in the First Tier submissions to react on Sellers’ submissions concerning the fixing date of the contract price, with a subsequent shared responsibility, and it seems equitable that such responsibility should be reflected in these costs, and are so awarded below.

4.8 Sellers have requested recovery of their legal costs. Buyers have succeeded in this Appeal and moreover, after having carefully considered this matter, we have concluded that these were purely commercial matters, well within the competence of commercial persons and the addressing and evaluation of the commercial matters did not require legal guidance and/or advice. WE THEREFORE DECLINE Sellers’ legal costs, declaring that both parties shall bear their own legal costs.

4.9 We have given consideration to the matter of interest on the principle sum awarded and payable to Sellers by Buyers. Sellers requested the rate awarded at First Tier. The Board agree, not only in respect to the rate, but also the treatment and make their award accordingly.
5.0 **AWARD**

5.1 **WE AWARD THAT** Buyers shall pay to Sellers immediately the sum of US$499,620.00 (Four Hundred and Ninety-nine Thousand, Six Hundred and Twenty United States Dollars), together with interest thereon at 4.5% (Four and One Half per Cent) per annum or pro rata, compounded with three-monthly rests from 21 July 2004 to the date of payment of the Award.

5.2 **WE FURTHER AWARD THAT** the fees, costs and expenses of the First Tier Arbitration shall be for Buyers’ account. If Sellers shall have paid any or all such costs in the first instance, they shall be entitled to immediate reimbursement.

5.3 **WE AWARD THAT** the fees, costs and expenses of this Appeal shall be equally shared between Sellers and Buyers. If one party has paid all such costs in the first instance they shall be entitled to immediate reimbursement of the portion due from the other party.

5.4 **No Award is made for legal costs; each party shall bear their own such costs.**