IN THE MATTER OF THE ARBITRATION ACT, NUMBER 19 OF 2000

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NUBIAN RESOURCES LIMITED (Claimant)

AND

METALCO INDUSTRIES LIMITED (Respondent)

....

FINAL AWARD

....

1. PREAMBLE

1.1 A dispute has arisen between the parties arising from a Contract for Sale of Goods entered into on 21st September 2010 between ICS Copper Systems Ltd—the Claimant's predecessor in title—and the Respondent for the sale and purchase, at the price of USD $ 1.5million, of a modern metal electroplating plant which it was hoped would substantially increase the tonnage of copper hitherto produced using a conventional electro-winning plant. The Claimant has been paid instalments totalling USD $520,000 and is asking to be paid the balance of the price for this equipment whose ownership was reserved in the seller till full payment. The Respondent resists making further payment and makes counter claims, one of which is that the sale should be rescinded on account of misrepresentations and breaches of warranty; the part payment refunded; and the equipment taken back by the seller.

1.2 The plant was originally set up for an ore treatment project at Mokambo but which idea was abandoned. The plant was dismantled and repacked in its crates which were taken to Kitwe. The first witness for the Claimant explained that they had urgent need for funds to invest in a property in America and it was decided

to find a buyer for this plant which on the face of it does not have a very large or readily available market. The first witness for the Respondent informed the arbitral tribunal that he was approached by one Graham Chisholm, then CEO of the Claimant, who allegedly sweet-talked him into agreeing to buy the plant which was vaunted to be capable of producing as much as 40 to 50 tonnes of copper using a Pregnant Leach Solution (PLS) of as low as 4 to 5 grammes per litre. The Claimant, of course, does not admit that it made any oral representations through anyone which turned out to be misrepresentations and which were inconsistent with the available written documents.

2. BACKGROUND

2.1 Parties

2.1.1 The Claimant is a company incorporated in accordance with the laws of Canada and having its registered office in Abbotsford, BC. It was formerly registered as ICS Copper Systems Ltd. It was interested in winning copper by electroplating and set up the plant in issue at Mokambo.

2.1.2 The Respondent is a company incorporated under the laws of Zambia and having its registered office in Lusaka. It was into copper winning and had branched into electro-winning before the Claimant approached it to interest it in a novel electro-metals electro-winning (hereafter referred to as EMEW) plant manufactured by messrs Electrometals Technologies Ltd of Australia. The principal witness for the Respondent told the arbitral tribunal how the then CEO of the Claimant had approached him and spoken in glowing terms about the potential performance of this new equipment which could even be set up in a remote location.

2.2 The Contract Agreement

2.2.1It is useful from the outset to set out the following excerpt from the Contract, namely clauses 1.1 through to clause 3.2 which were in the following terms:-

"1.1 Seller hereby agrees to transfer FOB Kitwe and deliver to buyer FOB Kitwe, on or before September, 30th the following goods:

270 CELL EMEW PLANT

Summary Scope of Supply

The scope of supply contemplated in this proposal is for a complete EMEW plant package, including all solutions reticulation, electrical, harvesting head and control equipment, walkways and steps containing the required number of EMEW cells mounted in an individual production module. The general scope of supply will extend from the solution feed pump(s) outlet through to extraction of cathode. The following table provides a general listing of major components in the facility

Copper Production Facilities (complete, portable and free standing)

- *9 Standard EMEW production modules, each containing 30 × 6 plating cells*
- *Rectifiers*
- *Manifolding*
- *Skids, walkways and stairs*
- *Manifold from pump to production modules (max distance 10 metres)*
- *Inter module connection (max distance 10 metres)*
- *Take off points for water flush facility*
- *Cell frames (powder coated MS – stainless steel optional)*
- *Electrical reticulation*
- *Safety switches and flow controls*

OTHER PROCESSING EQUIPMENT
Acid Stainless steel tanks × 2, Belt Filter, 100 kva generator, 7 electrolyte tanks pipes valves, pumps, fittings, 15 cell EMEW powder plant, 5 cell plating plant, rectifiers, compressors, gantry crane, HDPE liners, other tankage, and equipment required for cobalt plant.

1.2 Buyer agrees to accept the goods and pay for them in accordance with the terms of the payment schedule below.

1.3 Buyer and Seller agree that visual inspection and identification shall not be deemed to have been made until the buyer has inspected the goods and agrees that the goods in question fulfil the requirements of performance of said contract with the buyer.

2.1 Buyer agrees to pay a total sum of USD $1.5 million dollars for the goods as follows:

- *USD 200,000 paid no later than 8th September, 2010 after signature of this agreement and paid directly to ICS's USD a/c.*
- *Second down payment of USD 100,000 when plant is commissioned.*
- *Monthly payment of $USD 15,000 p.m. from date of this contract until such time as the plant is installed and commissioned, which shall not exceed 6 months from date of signature of this contract, at which time the balance outstanding to ICS to be repaid within a 12-18 month period in equal monthly instalments*
- *Payment in full to be made to ICS by no later than 24 months from the date of this contract.*
- *Once Metalco reach a production of 40 tons per month of copper then repayment of outstanding balance to be done sooner rather than later i.e. within 18 months of date of this contract.*

2.2 Goods shall be deemed received by buyer and ownership to pass upon payment in full of USD 1.5M.

2.3 Until such time as said goods have been received by buyer, all risk of loss from casualty to said goods shall be on seller.

2.4 Seller warrants that the goods are free from any security interest or other lien or encumbrance, that they shall be free from sale at the time of delivery, and that he nether knows nor has reason to know of any outstanding title or claim of title hostile to his rights in the goods.

2.5 Seller warrants the condition of EMEW equipment is brand new and has never been used before. The seller does not provide this warranty for the cobalt equipment listed above which is second hand. The other processing equipment (including the cobalt equipment) is used and may be in need of repairs which will be the responsibility of the buyer.

2.6 Seller warrants the working of the 270 cell EMEW plaint for 6 months provided

- *Equipment is professionally installed – buyers costs.*
- *Normal minor possible replacement of rubber 0 rings – buyers cost.*
- *Operated within technical specifications of the equipment.*

2.7 Late payment on any outstanding amount will bear interest 1 percent (1%) per month which will increase to 1.5 percent (1.5%) per month on the date 18 months after the date of this contract.

3.1 ICS indemnifies the purchaser against any other claim against the plant that is upheld at law.

3.2 The Purchaser has to move the Plant from its present location to the Purchaser's site within 10 days of signature of contract and shall at all times keep the Seller advised on a monthly basis of the location of the Plant and will advise the Seller if the purchaser wishes to move the plant to another location until the Purchase Price has been paid in full and title has passed to the Purchaser. The Purchaser will allow the Seller to register a lien over land and buildings of the Purchaser and the plant and equipment of this contract as security until such time as the plant has been paid in full."

2.2.2 The plant was meant to be a stand alone, a freestanding arrangement as opposed to the attempts later on to integrate this new plant into the conventional electro-winning operation located across the road. The arbitral tribunal was to hear that the Respondent had no wish to integrate the operations of the two plants which they expected to be run independently of each other.

2.2.3 It was common cause that this was to be a turnkey contract in which the seller would assist the buyer to set up and commission the plant. It transpired from what the arbitral tribunal was to hear that the performance of the plant during trials was nothing compared to that allegedly promised by Graham Chisholm leading the Respondent to describe it as probably just a white elephant for which it was prepared if necessary to forgo the amount paid and to make a further payment of up to USD $250,000 if only the seller would agree to take this equipment away.

2.3 The Dispute

The dispute in summary is whether, from the seller's point of view, the goods were sold and delivered without any of the misrepresentations alleged by the buyer who has since lost the right to reject them such that the seller is entitled to the balance of the price. From the buyer's point of view, the dispute is whether the goods were neither brand new nor capable of performing as represented so that the Contract should be rescinded; the down

payment should be refunded; and the seller must take back the equipment which they still own.

2.4 The Arbitration Agreement

Clause 4.2 of the Contract provided for arbitration and was in the following terms:-

"4.2 If any dispute arises under this Agreement which is not resolved within 21 days by negotiations or mediation, the Seller and Purchaser shall submit it to binding arbitration by a mutually agreeable arbitrator and failing agreement on the choice of arbitrator within 10 days after the 21 days, an impartial Canadian arbitrator shall be appointed by the independent escrow lawyer. The decision of the arbitrator shall be binding upon all parties"

2.5 Appointment

I was appointed by the High Court in a Ruling forwarded to me by the advocates and which was in the following terms:

"The Applicant has applied for an Order of appointment of an Arbitrator pursuant to the High Court Ruling dated 4th of March, 2013.
On the 4th of March, 2013, I delivered a ruling which stated that in the event of de fault of the agreement by the parties on whom to appoint as Arbitrator, the
Court would be moved to appoint an Arbitrator from the list submitted by the Applicant. The Respondent appealed the said ruling. The said appeal was dismissed upon a Notice of Motion filed by the Applicant in the Supreme Court.

The Applicant proposed the following names as Arbitrators

(i) Mr. Mulambo Haimbe
(ii) Mr. Likando Kalaluka

The Respondent on the other hand proposed the following names;

(i) Retired Judge Mathew Ngulube
(ii) Hon. Justice Charles Kajimanga
(iii) Hon. Dr. Patrick Matibini

I have considered the application and the names of the arbitrators proposed as well as the nature of the dispute namely contract of sale of goods. The proposed names submitted by the parties are suitable individuals capable of dealing with the nature of the dispute. There agreement however provided for one Arbitrator.

I hereby therefore appoint Hon. Justice Mathew Ngulube (Retired) to be the Arbitrator in respect of the dispute. In the event that the Appointed Arbitrator is not in a position to arbitrate over the matter, Hon. Justice Charles Kajimanga shall be the Arbitrator. For the avoidance of doubt I hereby Appoint Hon. Justice Mathew Ngulube as Arbitrator in respect of the dispute.

It is further ordered that the parties do declare and submit the dispute within 14 days from date hereof.

Costs are in the cause.

Dated the 28th day of August, 2013

(signed)

....
Hon. Mrs. Justice F. M. Chishimba
HONOURABLE JUDGE"

Having satisfied myself that the matter was within my competence, I accepted the appointment.

2.6 Orders for Directions

The Preliminary Meeting was held on 30th October 2013. Having heard from the Advocates on both sides, I issued the Order for Directions No.1 which was adhered to with some adjustments to the deadlines. In issuing the directions I was alive to the fact that Article 19 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, domesticated as the First Schedule to our Arbitration Act, No. 19 of 2000, empowers me to decide all procedural and evidential matters subject of course to the right of the Parties to agree on any matter.

The following Directions were therefore issued:-

"ORDER FOR DIRECTIONS NO. 1

....

WHEREAS the preliminary interlocutory meeting was held at the LAZ offices on Lagos Road, Lusaka, on 30th October, 2013, from about 15.00 hours attended by the Arbitral Panel [consisting of the Sole Arbitrator] and by the advocates for the parties:

UPON HEARING the Advocates on both sides and by consent IT IS ORDERED AND DIRECTED THAT:

1. **The Arbitral Tribunal's fee be set and capped at [figure given] rebased payable in equal parts by the parties and that a down payment of not less than half the amount due from each side be paid by the parties while the balance of the fee shall be settled before the publication of the Award herein.**

2. **The Claimants shall serve a Statement of Case accompanied by all relevant documentary evidence in support on or before 20th November 2013.**

3. **The Respondent shall serve a Statement of Defence and Counterclaim if any accompanied by all relevant documentary evidence in support on or before 18th December 2013.**

4. **The Claimants shall serve a Statement of Reply and Defence to Counterclaim (if any) on or before 8th January 2014.**

5. **Either party may request the other to produce specific documents material to the requesting party's case if not already part of the documentary evidence accompanying the other's pleading.**

6. **There shall be both documentary and oral evidence in the arbitration.**

7. **Witness Statements on both sides which shall stand as evidence-in-chief shall have been served at least 10 days before start of the Hearings.**

There be a Status Conference only if need arises on a date to be agreed in due course in the LAZ Boardroom to review the state of preparedness for the hearings; and to finalize any outstanding issues.

8 The hearings will take place in the LAZ Boardroom and each side shall contribute equally to the hire charges for the venue.

9 The hearings shall take place from 17th to 21st February, 2014.

10 The Rules of evidence shall be relaxed.

11 There shall be final written submissions [by the Claimant within two weeks of the close of hearings and by the Respondent within two weeks thereafter] to be followed by a reasoned Award [within ninety days of the last submission] based on findings of fact and the laws applicable in this country.

12 Communications be in writing and copied to all concerned.

13 There shall be liberty to apply at any stage.

ORDER made at Lusaka the 30th day of October, 2013.

.................[signed]..

Justice M.M.S.W.Ngulube (rtd), MCIArb.

To

Messrs Corpus Legal Practitioners

Attention: Mr Mabvuto Sakala/Miss Natasha Banda

And to

Messrs A M Wood & Co

Attention: Mr James Banda."

3. CONTENTIONS OF THE PARTIES

3.1The Claimant Contends that—

(a) Prior to the date of the Contract, the Claimant availed the Respondent with all the technical information and requirements of the

EMEW Plant in order to provide the Respondent with a full understanding of the working capacity of the Plant which was brand new.

(b) After the signing of the Contract, the Plant was installed and later commissioned; it is functional and able to produce copper at a quality which meets the production capability stated within the Contract.

(c) The Contract did not state anywhere that the Plant could or would produce 40 tons of copper using a Pregnant Leach Solution (PLS) of 4-5 gpl; the reference to 40 tons per month presupposed a suitable feed and was for purposes of accelerating the payment of the balance of the purchase price.

(d) The refusal or failure by the Respondent to pay the balance of USD $980,000 after making several earlier payments was in breach of contract; the Claimant is entitled to damages and payment of this balance with interest at the agreed rate.

(e) The Respondent is not entitled at this stage to reject the Plant.

3.2 The Respondent Contends that—

(a) Prior to and at the time of the Contract, the Claimant's CEO then, one Graham Chisholm made oral representations or more accurately misrepresentations concerning the performance of the Plant which could produce 40 to 50 tons of copper using a PLS of 4 to 5 gpl and which could be set up even in a remote location. The misrepresentations induced the Respondent to enter into the Contract.

(b) The Plant was not brand new as claimed; it had defects and required repairs. After installation and commissioning, the Plant has failed to perform even after it sought to rely not on PLS but on Advanced Electrolyte (AE) to be diverted from the Respondent's conventional electro-winning operations when it still could not produce anything like 40 tons.

(c) The Claimant has failed to make the Plant work as a stand-alone using PLS and the Respondent does not want to purchase a white elephant or to invest further huge amounts in additional equipment and facilities as subsequently recommended by the manufacturers.

Since ownership has never been transferred, the Plant still belongs to the Claimant and they should take it away.

(d) The Claimant should refund the USD $520,000 paid by the Respondent and they should pay damages.

4. ISSUES IN CONTENTION

Arising from the pleadings, the oral and the documentary evidence and from the detailed learned submissions of counsel on both sides, I distil the following issues in contention:

(a) Whether the Claimant's former CEO made pre-contract oral representations regarding the capability and what tonnage the "complete EMEW Plant package" supplied and which included "complete, portable and free standing" Copper Production Facilities could achieve using PLS of 4 to 6 gpl and if so whether the representations can be considered and to what effect.

(b) Whether the reservation of title via a Romalpa clause until full payment of the price had any bearing on the seller's entitlement to be paid and the buyer's obligation to pay the rest of the price.

(c) Whether there was a breach of Contract or of any conditions or terms or warranties by either party and if so with what consequences in light of the Sale of Goods Act, 1893.

(d) Whether the Claimant is or is not entitled to the reliefs in the Statement of Case.

(e) Whether the Respondent's defence and/or counterclaims should be upheld.

5 HEARING

5.1 The hearings took place in the William Burton Place boardroom which was available in lieu of the LAZ Boardroom.

5.2 At the hearing the Claimants were represented by Mr. Mabvuto Sakala and Miss Natasha Banda and Mr. Kelly Kapyanga of Messsrs Corpus Legal Practitioners and the Respondents were similarly represented by Mr. James Banda and Mr. Kebby Wishimanga of Messrs A. M. Wood & Co.

(a) At the hearing counsel filed final submissions and witnesses were examined, cross-examined and re-examined. The witness statements stood as evidence in chief while no verbatim transcript of the cross-examination and re-examination was prepared since the parties declined to engage a transcriber. The parties and the arbitral tribunal thus had to keep their own note of the proceedings.

(b) The various witnesses were:

For the Claimant:

CW 1 Mr. Markus Janser, a director in the Claimant;

CW 2 Mr. Lawrence Garnet Treadgold, CEO of the Claimant;

CW 3 Mr. Kenneth Graham Fisher, an Engineer and Consultant.

For the Respondent:

RW 1 Mr. Hussein Safieddine, the MD of the Respondent;

RW 2 Mr. Alaa Noureddin, Plant Manager of the Respondent;

RW 3 Mr. Lloyd Soko, an Assayer.

6 SUBMISSIONS AND EVIDENCE

6.1 NOW, I, Mathew M.S.W. Ngulube, having read, considered and taken due notice of the pleadings, written arguments and submissions, written and oral evidence adduced by the parties and the final submissions of counsel MAKE AND PUBLISH THIS MY AWARD.

6.2 Section 16(2) of the Arbitration Act [no. 19 of 2000] requires that the award shall contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with the reasons. In the case at hand the parties agreed that the award should be reasoned. I therefore hereby render a reasoned award.

6.3 In rendering this reasoned award I bear in mind that the law to be applied is that applicable in Zambia, which will include the Common law of England and the doctrines of equity applicable by virtue of the English Law (Extent of Application) Act, CAP 11 of the Laws of Zambia as well as the old English statutes applicable by virtue of the British Acts Extension Act, CAP 10 of the Laws of Zambia. Of particular importance in this arbitration is the Sale of Goods Act, 1893 which is crisply in point. In this regard, care will be taken when looking at the decided English cases not to swallow lock stock and barrel cases based on their 1979 Act and later statutes which replaced the 1893 Act and which relatively recent statutes do not apply in this country.

6.4 ISSUE (a) Whether the Claimant's former CEO made pre-contract oral representations regarding the capability and what tonnage the "complete EMEW Plant package" supplied and which included "complete, portable and free standing" Copper Production Facilities could achieve using PLS of 4 to 6 gpl and if so whether the representations can be considered and to what effect.

6.4.1 There are two aspects to this issue: One is factual and the other legal. As far as the factual position is concerned, I have little choice but to accept the evidence of RW 1 which was uncontroverted and which stood intact despite rigorous cross-examination. It had a distinct ring of truth to it. I will proceed on the footing that Mr. Graham Chisholm did sweet talk RW 1 into buying the equipment and that in doing so, he did make representations which turned out to be inaccurate. They were misrepresentations. As will shortly appear, it does not really matter anymore if the false statements were made fraudulently or innocently.

6.4.2 RW 1 was not entirely without support from the documents on the point. The Contract itself talked of a stand-alone plant intended to use PLS. That was apparently how it was set up at Mokambo. The Contract spoke of 40 tonnes when even the period within which to pay the balance would be cut short so that the plant was indeed vaunted as capable of producing such tonnage. The only point of disagreement was the quality of the PLS but even then, it should be noted, there was at the time nothing said about any Solvent Extraction (SX) plant being required to enhance the PLS to levels that would deliver 40 to 50 tonnes per month, let alone the use of Advanced Electrolyte (AE). Subsequent commissioning trials and Reports became pre-occupied with attempts to integrate the EMEW into the conventional operation and with using AE, lamenting even that the Respondent was not willing to divert enough AE. As RW 1 made clear, this was not what he had bargained for.

6.4.3 As Counsel for the Claimant correctly observes, Mr. Graham Chisholm's alleged misrepresentations did not find their way into the written Contract. They were not incorporated as terms or conditions or warranties. In the premises, many authorities have been cited about such representations and the need to uphold only that which has been reduced into the written bargain and disallowing parol evidence to contradict or override what is written. No one can quarrel with the cited authorities if the position were that the Contract mentioned a specific quality of PLS and the witness tried to assert another. Here, the Contract is silent on the point. As will shortly appear, such misrepresentations do not have to be read into the Contract nor to become terms of the Contract in order to have efficacy: They can be accorded independent recognition as operative factors that induced one of the parties to enter into the Contract. As Counsel for the Respondent points out in his final submissions, the Respondent did not stop relying on Graham's pre-contract oral representations. Even the witnesses for the Claimant, especially CW 2, wondered under cross-examination in relation to the two efforts at commissioning why and how the Respondent kept expecting to harvest a substantial tonnage using a low grade of feed.

6.4.4 Our Misrepresentation Act, CAP 69 of the Laws of Zambia, is instructive and reads, in sections 2 and 3—

"2. Where a person has entered into a contract after a misrepresentation has been made to him, and-
(a) the misrepresentation has become a term of the contract;
or
(b) the contract has been performed;
or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b). [Removal of certain bars to rescission for innocent misrepresentation]
3. (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto, and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts as represented were true.
[Damages for misrepresentation](2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled by reason of the misrepresentation to rescind the contract, then, if it is claimed in any proceedings arising out of the contract that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2), whether or not he is liable for damages under subsection (1), but where he is so liable, any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1)."

6.4.5 Contractual promises which become terms of the Contract are one thing; misrepresentations external to the Contract are quite another. The learned authors of Chitty on Contracts, vol.2, 28th ed. explain this very well in paragraphs 43-044 and 43-045 where we read [omitting all citations]:--

"Misrepresentation external to the contract. The law recognises a third category, that of a misrepresentation of fact which does not constitute a contractual promise but which nevertheless forms sufficient part of the inducement to contract to justify the granting of a remedy to the representee. Such representations, not being promises, did not ground any relief at common law unless they were made fraudulently, in which case there was liability in deceit. From the late nineteenth century however it was established that equity would grant relief by way of rescission and indemnity, and although it was arguable that since the Act made no reference to this jurisdiction it did not apply to sale of goods, it is now clear that it does so. The jurisdiction was much improved by the Misrepresentation Act 1967, which by section 1(b) abolished a possible limit on the right to rescind; by section 2(1) created a statutory action against a party to a contract who made such a misrepresentation negligently; and by section 2(2) empowered the court to grant damages in lieu of rescission. It also made provision against terms excluding liability for misrepresentation. Meanwhile the possibility of a tortious action in negligence was established in Hedley Byrne & Co. Ltd v. Heller & Partners Ltd, and the action on a collateral contract, the use of which had earlier been restricted in this context, has also become prominent.

Distinction between terms of the contract and external misrepresentations. The distinction can be extremely difficult to make in this context. It is easier to classify a statement as a mere representation where there is a considerable time-gap between negotiation and contract or where the negotiations are oral and the contract written e.g. in the sale of land. These conditions less frequently occur in the sale of goods. The test of a contractual promise still appears to be whether there is evidence *of an intention by both parties that there should be contractual liability in respect of the accuracy of the statement. But it may be that to some extent one should consider the consequences of attributing a statement to either category before doing so. There are important differences between those consequences."*

6.4.6 The representations made by Mr Chisholm were accordingly misrepresentations external to the Contract. It remains to be seen a little later if, in light of all that has transpired and the consideration of the other issues and factors, it is equitable or not to allow rescission.

6.4.7 Another misrepresentation alleged was that the EMEW Plant was "brand new". This was actually written into the Contract and I have received detailed learned submissions what the expression might mean. It is submitted that the description of the equipment as brand new was not wrong given the fact that it had not been used or had hardly been used before; it had clocked very little usage and the repairs required to be undertaken to make it functional were of a minor nature. It has been argued that if this was a sale by description within the intendment of the Sale of Goods Act, 1893, then the seller was in no way in breach. As a matter of plain English, I have no doubt that the Plant was not in fact brand new as that expression is commonly understood. In the context of this arbitration, I understood the Respondent to be simply cataloguing this as another misrepresentation on top of those by Graham Chisholm. My understanding of RW 1's evidence taken in its totality was that, in spite of all these misrepresentations, the Respondent would have been quite happy to affirm the Contract if between the manufacturers and the Claimant they managed to make the EMEW deliver 40 tonnes of copper as a separate and economically viable free-standing operation using available low grade PLS as promised by Graham Chisholm. They were not prepared to invest additional huge amounts of dollars in processes to enrich the PLS nor to divert the AE from their SX Plant to the EMEW away from their conventional operation. The trials during commissioning used AE of 18 gpl and produced 750kg a day which would translate into 20 to 21 tonnes per month prompting RW 1 to declare during his cross-examination that to get 20 tonnes and spend USD $1.5million is just a joke.

6.4.8 It follows from the foregoing that the submissions on both sides that there was or there wasn't breach of a sale by description of a brand new plant were surplus to requirements of these proceedings. The goods were never in point of fact actually rejected on that ground: The Respondent fully collaborated in efforts to repair and attempts to commission; finally

opting out when it became clear Graham's pre-contract promises were untenable.

6.4.9 Mr. Graham Chisholm was not called as a witness. I can not speculate what he might have said and, as already noted elsewhere before, that leaves me with no choice but to accept the uncontroverted evidence of RW 1.

6.4.10 It is my FINDING and DECISION that Mr. Graham Chisholm did make misrepresentations as alleged by RW 1 and that the Respondent was induced by these to enter into the Contract.

6.5 ISSUE (b) Whether the reservation of title via a Romalpa clause until full payment of the price had any bearing on the seller's entitlement to be paid and the buyer's obligation to pay the rest of the price.

6.5.1 It will be recalled that by clauses 2.2 and 2.3 of the Contract both the ownership and the risk have never transferred to the buyer. The goods are still the property of the seller. Since the Court of Appeal in England in ALUMINIUM INDUSTRIE VAASSEN B.V. v. ROMALPA ALUMINIUM LTD [1976] 2 All E R 552 upheld the seller's reservation of the right of disposal of goods under a clause by which the seller retained title to the goods until all sums owing from the buyer were paid, such clauses have become quite popular. Undoubtedly, under this authority which is of persuasive value in this country, our Claimant retains a right of disposal of the EMEW equipment.

6.5.2 It should also be noted that section 1 of the Sale of Goods Act draws a distinction between a contract under which the property in the goods is transferred, which is a contract of sale, and one where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, called an agreement to sell. The Contract in this arbitration was without any doubt an agreement to sell. The category into which the Contract falls is relevant when it comes to the types of remedy available under the general rule.

6.5.3 Parties who insert such clauses should also bear in mind that, in Zambia, their Agreement may quite easily and unintentionally be caught

by the Hire Purchase Act, CAP 399 of the Laws of Zambia which in section 3 says:-

"3. (1) In this Act, unless the context otherwise requires-

"hire-purchase agreement" means-

(a) any contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments;

(b) any contract which provides for the hiring of goods whereby the hirer has the right-

(i) to purchase such goods after two or more instalments have been paid in respect thereof; or

(ii) after two or more instalments have been paid in respect thereof, to continue or renew from time to time such hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise

whether or not the agreement may at any time be terminated by either party or one of the parties;

(c) any other contract which has, or contracts which together have, the same import as either or both the contracts defined in paragraph (a) or (b) of this definition, whatever form such contract or contracts may take;"

[underlining supplied]

Such an undesirable consequence visited the parties in cases like BURTON CONSTRUCTION LTD v. ZAMINCO LTD [1983] ZR 20 and KEARNEY AND CO LTD v. TAW INTERNATIONAL LEASING CORPORATION [1978] ZR 329 which counsel may wish to peruse for their full terms and purport.

6.5.4 The seller's right of disposal affirmed in section 19 of the Act is a real right. The right to sue for the price or for damages is a personal right.

This arbitration is in the nature of an action for the price with an alternative claim sounding in damages. These are matters which are governed by sections 49 and 50 of the Sale of Goods Act under which, generally speaking, an action for the price is competent where the property in the goods has passed while an action for damages is the appropriate remedy where the property has not passed: see 4th edition, Sale of Goods by ATIYAH, Chapter 25 from page 262; and see 28th edition CHITTY ON CONTRACTS volume 2, paragraph 43-357 et seq [action for price when the property has passed] and paragraph 43-366 et seq [action for damages where the property has not passed].

6.5.5 When goods are sold and delivered, the obligation to pay is normally married to the passing of the property which in turn is normally married to the delivery of specific goods. This is what section 28 of the Act provides when it says delivery of the goods and payment of the price are concurrent conditions; Counsel for the Claimant has relied quite heavily on section 49(2) and a number of excellent authorities in favour of the one exceptional case in which a seller may sue for the price although the property has not passed. Section 49(2) provides:-

"Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

6.5.6 One thing which stands out immediately is that the subsection speaks of a contract of sale, rather than an agreement to sell. Of course, it is possible to give the expression 'contract of sale' a generous flexibility so as to capture our Contract since the section envisages situations where goods might not even have been delivered. A good example which even Counsel for the Claimant has cited is afforded by WORKMAN CLARK & CO. LTD v. LLOYD BRAZILENO [1908] 1 K.B. 968. There, a seller who was constructing a ship for the buyer was held to be entitled to sue for the instalments as they became due according to the stage reached in the construction of the vessel. By logical extension, it could be argued that if all instalments, the whole price in fact, had been due on completion of the ship, then the seller could sue for the price although the property had not yet passed. The learned ATIYAH in Chapter 25 of his book previously

mentioned doubts whether the subsection should be stretched so far, pointing out the importance of the passing of ownership when, in the case of the seller, the duty would still be on him/her as the owner to mitigate his/her damage by attempting to resell the goods or otherwise. When the property has passed, the goods now belong to the buyer and not the seller, and it becomes the buyer's responsibility to take delivery of the goods or otherwise dispose of them. I tend to agree with ATIYAH and share his views on this. This stance accords with what the parties in this arbitration themselves intended and emphasized when they gave the word 'received' a very special meaning in clauses 2.2 and 2.3 of the Contract: *"Goods shall be deemed received by buyer and ownership to pass upon payment in full of USD1.5M" and "Until such time as said goods have been received by buyer, all risk of loss from any casualty to said goods shall be on seller".*

6.5.7 Although the property has never passed, it would be unforgivable if I were to ignore completely and not address the question of balance of convenience. The equipment was installed at Kabwe though once again it has hardly been used. It has not been used beneficially; only for trial runs during two commissioning attempts. The EMEW Plant can perform and it is strictly speaking functional though nowhere near the levels the Respondent was led to believe and to expect. I will accept the evidence of RW 1 that the disappointing performance does not add value to their operations and that the recommendations by the manufacturer for improving the situation would entail huge expense in millions of dollars. It would be far cheaper to dismantle the plant and put it in containers. This has been done before when the plant was removed from Mokambo to Kitwe and thence to Kabwe.

6.5.8 It is my FINDING and DECISION that the reservation of title has a major bearing in this arbitration on the types of remedies the seller is entitled to.

6.6 ISSUE (c) Whether there was a breach of Contract or of any conditions or terms or warranties by either party and if so with what consequences in light of the Sale of Goods Act, 1893.

6.6.1 The Contract provided for instalment payments by which the whole price would have been paid within 24 months. Payment was to have been accelerated upon the Plant hitting production levels of 40 tons per month. The buyer obviously did not stick to the contractual payment schedule and decided to make no further payments when the commissioning exercises failed to meet expectations or to demonstrate that 40 tons would ever be reached using PLS as stipulated in the Contract and envisaged under clause 2.1 thereof.

6.6.2 Clause 1.3 of the Contract shows that the parties were alive to the issue of performance. They said there that *"Buyer and Seller agree that visual inspection and identification shall not be deemed to have been made until the buyer has inspected the goods and AGREES that the goods in question FULFILL THE REQUIREMENTS OF PERFORMANCE of said Contract with the buyer".[emphasis supplied].*

6.6.3 Stoppage of payments was on the face of it in breach of contract unless there is or was legally recognisable justification to render the same not wrongful. There were learned submissions on payments due when payable on a day certain. In my considered opinion, the question of payment on a day certain has to be considered on the totality of the facts and circumstances of the matter at hand rather than in vacuo or as a mere legal proposition. In this regard, the written Contract did not set out what the performance of the equipment would be in terms of tonnage, only the percentage purity of the copper to be produced. It is thus only from the representations made by Mr. Graham Chisholm as recounted by RW 1 that we learn what the Plant was said to be capable of. Those representations were in point of fact false, as I have found and accepted. It is not wrong for a buyer to repent of an agreement where the goods will not deliver or perform as promised when the whole underlying purpose of the transaction, to the knowledge of both parties, is the production of significant quantities of copper from a stand-alone Plant which uses available PLS.

6.6.4 I accept that both parties plus the manufacturer tried hard to make it viable, to the point of even departing from the Contract so as to integrate the EMEW into the conventional circuit. The witnesses for the Claimant told the arbitration that the effort to marry the two and to divert AE from the SX plant was at the instance and request of the

Respondent. On an issue of credibility, I am inclined to accept what RW 1 told the arbitral tribunal. He was consistent and his attitude towards the EMEW can only logically be accounted for on his understanding and version of the events.

6.6.5 It is my FINDING and DECISION that aside from non-acceptance discussed later the only breach with any significant consequence upon the Contract was that of promises made outside the Contract but leading up to and inducing the same.

6.7 ISSUE (d) Whether the Claimant is or is not entitled to the reliefs in the Statement of Case.

6.7.1 In the Statement of Case, the Claimant has asked for the balance of the purchase price plus interest or, alternatively, damages. The claim for the balance of the purchase price encounters the hurdles previously hereinbefore alluded to. I have not seen how the buyer can be compelled to complete the purchase of this equipment which is still the property of the seller.

6.7.2 The Sale of Goods Act, 1893 gives guidance what sort of remedies are available to the parties under various scenarios. An obvious remedy which is still available to the seller is the real remedy previously discussed of their *right of disposal.* Assuming for the sake of argument that the buyer's refusal to accept the goods and complete the transaction is wrongful and a breach entitling the seller to damages, the right of disposal fits in with the duty to mitigate since the general rule on the measure of damages laid down under section 50(2) is that-

"The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events from the buyer's breach of contract".

6.7.3 I am fully alive to the very learned submissions which urged that no reliance be placed on oral pre-contract misrepresentations which were at variance with the written word. The very high expectations provoked by Mr Chisholm's misrepresentations should have been moderated by the

written documents, such as the warranty on the working of the 270 cell EMEW plant provided it was *"operated within the technical specifications of the equipment".* The literature availed on the working of similar equipment in other countries showed that the PLS feed had to be of a fairly high quality and grade [in Chile, the solution composition for *Cu* was 36-42g/l], nothing at all like the normal low grade 1-6g/l PLS obtainable in Zambia, according to the evidence of RW 3, the assayer. In my considered opinion, the buyer got carried away by Mr. Graham Chisholm's sweet talk which turned out to be completely unrealistic. The buyer on account of RW 1's apparently unrestrained gullibility should therefore shoulder some of the blame for the failure of this Contract; especially after co-operating fully in the trials to the point of supplying AE in place of PLS and promising to resume payments if the seller succeeded in getting a good result

6.7.4 It is my FINDING and DECISION that the Claimant is entitled to an unpaid seller's *right of disposal* of the EMEW Plant which in any event has always remained their property and which the Claimant must now retrieve. In addition, they are entitled to damages for non-acceptance by the buyer on the footing ordained by section 50(3) of the Sale of Goods Act, 1893 to be ascertained by the difference between the Contract price and the market or current price at this time. This approach has been affirmed in such cases as ZCCM LTD v. GOODWARD ENTERPRISES LTD SCZ Judgment no. 7 of 2000. Such damages if not agreed are to be assessed by the Deputy Registrar of the High Court.

6.8 ISSUE (e) Whether the Respondent's defence and/or counterclaims should be upheld.

6.8.1 Learned Counsel for the buyer had equally lodged detailed final submissions which I have taken on board while considering the Claimant's claims as well as the opposition to them. For the reasons already discussed, I do not award the unpaid balance of the price. Instead, the EMEW Plant is to be retrieved by the Claimant as the owner and disposed of by resale or otherwise in any other way as they think fit. I should point out that in this I am awarding rescission and not affirming

any right of rejection. As was pointed out in JAFFCO LTD v. NORTHERN MOTORS LTD [1971] ZR 75 (CA), rescission and rejection are two completely different things.

6.8.2 The counterclaim for refund of the USD$520,000 paid succeeds as a matter of course following upon what has hereinbefore been found and decided SAVE that the damages awarded to the Claimant must first be ascertained and set off. The party owing the difference upon the set off shall forthwith pay the same to the other, reckoned in US dollars with interest at 1.5% (one and a half per cent) from the date of the writ filed in court in the action leading to my appointment to the date of payment.

6.8.3 Since the Respondent who shares the blame for the failure of the agreement has succeeded in rescinding the Contract, I DETERMINE that the justice of the arbitration in the circumstances does not call for an award of damages as well in respect of the misrepresentations.

6.8.4 It is my FINDING and DECISION that the Respondent is entitled to rescission of the Contract and to a refund of the USD $520,000 paid SAVE that only the difference on a set off between this amount and the damages awarded to the Claimant once ascertained will be paid by the party owing the other.

7. SUMMARY

7.1 It is my FINDING and DECISION that Mr. Graham Chisholm did make misrepresentations as alleged by RW 1 and that the Respondent was induced by these to enter into the Contract.

7.2 It is my FINDING and DECISION that the reservation of title has a major bearing in this arbitration on the types of remedies the seller is entitled to.

7.3 It is my FINDING and DECISION that aside from non-acceptance discussed later the only breach with any significant consequence upon the Contract was that of promises made outside the Contract but leading up to and inducing the same.

7.4 It is my FINDING and DECISION that the Claimant is entitled to an unpaid seller's *right of disposal* of the EMEW Plant which in any event has always remained their property and which the Claimant must now retrieve. In addition, they are entitled to damages for non-acceptance by the buyer on the footing ordained by section 50(3) of the Sale of Goods Act, 1893 to be ascertained by the difference between the Contract price and the market or current price at this time. Such damages if not agreed are to be assessed by the Deputy Registrar of the High Court.

7.5 It is my FINDING and DECISION that the Respondent is entitled to rescission of the Contract and to a refund of the USD $520,000 paid SAVE that only the difference on a set off between this amount and the damages awarded to the Claimant once ascertained will be paid by the party owing the other.

8. INTEREST

8.1 I now have to consider the interest on the amounts I have determined as due to the Claimant and to the Respondent.

8.2 Section 16 of our Arbitration Act 2000 governs the award of interest.

8.3 The parties had agreed in the Contract that the dollar sums outstanding should attract interest at the modest rate of 1.5%. I can think of no good reason to depart from such rate even here and the amounts due to each side will carry this interest accordingly.

8.4 For avoidance of doubt the amount due to the Claimant will be the sum for damages reckoned in dollars either that to be agreed between the parties or in default that to be assessed by the Deputy Registrar. The amount due to the Respondent is the sum of USD $520,000 being refund of payments made.

8.5 I direct that there will be a set off of the amounts due to the one against those due to the other and that the Party owing shall pay the difference.

9. COSTS OF THE ARBITRATION

9.1 Section 16 (5) of the Arbitration Act 2000 provides that

"Unless otherwise agreed by the parties-

(a) the costs and expenses of an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration, shall be as fixed and allocated by the arbitral tribunal in its award;

(b) where the award does not specify otherwise, each party shall be responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration."

9.2 Absent any specific agreement on the point which the parties may care to enter into, the general rule in arbitrations as in litigation is that costs follow the event and they are awarded to the successful party. In this arbitration, neither party has completely won nor completely lost. The outcome is more like a draw. For this reason, it is only fair that each bear their own costs, which means each shall be responsible for their own legal costs and each shall be responsible for half of the costs of the arbitration, which include the arbitrator's fee.

10. AWARD

10.1 NOW THEREFORE I DECIDE AND AWARD IN FULL AND FINAL SETTLEMENT OF ALL CLAIMS BEFORE ME AS FOLLOWS:

(a) The Claimant has the right of disposal of the EMEW Plant and all the other equipment that was to be sold under the Contract and which they must retrieve.

(b) The Respondent shall pay to the Claimant damages for non-acceptance, such damages to be agreed or assessed as already directed.

(c) The Claimant shall refund the sum of USD $520,000 to the Respondent.

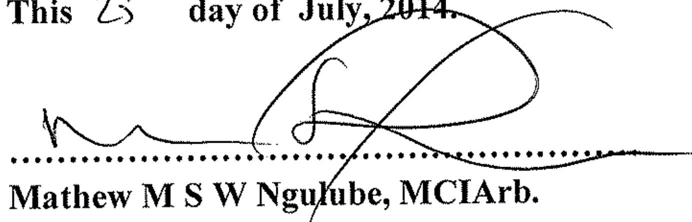
(d) There shall be a set off of the said damages against the said refund and the party found owing upon such set off shall promptly pay the difference to the other, with interest as already directed.

(e) The parties shall bear the costs of the arbitration equally and each shall pay their respective legal costs and expenses.

(f) I declare that no further awards are due or warranted.

MADE AND PUBLISHED BY ME AT LUSAKA

This 25th day of July, 2014.



Mathew M S W Ngulube, MCIArb.

Whose signature has been witnessed

This 25th day of July, 2014
Name: Miss Chungu Mufumbi
Address: C/o Messrs. Chifumu Banda & Associates
Andrew Mwenya Road, Rhodes Park
Off Church Road, P.O. Box 31025
LUSAKA
Occupation: Personal Assistant/Secretary