

CLAIMANT'S SUBMISSION N° 2

IN THE MATTER OF AN ARBITRATION

BETWEEN

VALVISION TELECOMMUNICATIONS B.V.

Claimant, Respondent In Counterclaim

AND

VISION NETWORKS N.V.

VISION NETWORK HOLDING B.V.

Respondents, Counterclaimants

CLAIMANT'S FIRST SUBMISSION ON THE MERITS

Alan D. Sugarman, Esq.
Ellen Bessis, Esq.

April 2, 2001

TABLE OF CONTENTS

<u>I.</u>	<u>INTRODUCTION</u>	6
<u>II.</u>	<u>SUMMARY</u>	6
A.	THE DISPUTE.....	6
B.	SIGNIFICANT PROVISIONS OF THE GENERAL AGREEMENT:.....	9
C.	SIGNIFICANT PROVISIONS OF THE SPA AGREEMENT	10
D.	SUMMARY OF THE KEY DATES	10
E.	SPECIFICS OF THE PREEMPTIVE RIGHT IN THE GENERAL AGREEMENT.....	13
F.	RELATIONSHIP BETWEEN THE SPA AND THE GENERAL AGREEMENT.....	14
<u>III.</u>	<u>PRIOR PROCEEDINGS.....</u>	15
<u>IV.</u>	<u>THE FACTS</u>	16
A.	KPN OBTAINS CONTROLLING INTEREST IN RCF IN 1995-1996.....	16
B.	VALVISION AND KPN COMMENCE NEGOTIATIONS—OCTOBER 1998	17
C.	NEGOTIATIONS ON JANUARY, 1999—BREAKDOWN.....	18
D.	RESUMPTION OF NEGOTIATIONS IN MARCH, 1999	18
E.	MARCH 9, 1999—KPN NOTIFIES BRUSSELS AND GILLAM OF TERMS OF DEAL WITH VALVISION	20
F.	INTERCOMM HOLDINGS, GERARD LE FEBVRE, AND UPC	21
G.	CHRONOLOGY OF THE EXECUTION OF THE SPA	25
1.	CONCLUDING THE NEGOTIATIONS: MARCH 19, 1999 TO APRIL 11, 1999.....	25
2.	PREPARING THE DOCUMENTS AND EXECUTION OF THE SPA—APRIL 15, 1999 TO APRIL 22, 1999.....	25
H.	THE 20 DAY PREEMPTION PERIOD.....	27
1.	THE NOTIFICATION DATE WAS APRIL 29, 1999	27
2.	THE 20 BUSINESS DAY PERIOD ENDED MAY 27, 1999—A BUSINESS DAY IS “ANY DAY ON WHICH BANKS ARE OPEN FOR BUSINESS IN PARIS FRANCE.”	30
I.	LATE-APRIL MAY 1999. EVENTS OCCURRING DURING THE 20 BUSINESS DAY PREEMPTION PERIOD.....	30
J.	MINORITY SHAREHOLDER DELIVER PREEMPTION NOTICES ON MAY 31, 1999.....	31
1.	NOTICE OF PREEMPTION NOT DELIVERED IN A TIMELY MANNER	31
K.	KPN LEARNS ON JUNE 1, 1999 THAT BRUSSELS-GILLAM HAD IN SUBSTANCE ASSIGNED THE PREEMPTIVE RIGHT TO UPC.....	32
L.	BRUSSELS AND GILLAM FAIL TO MAKE THE DOWNPAYMENT REQUIRED IN THE SPA.	33
M.	THE REQUIREMENT IN THE GENERAL AGREEMENT TO CLOSE WITHIN TEN DAYS.....	34
N.	VALVISION DEMANDS RETURN OF DOWNPAYMENT.....	34
O.	TRANSFER OF SHARES TO UPC.....	36

<u>V. REVIEW OF THE WITNESS HEARING TESTIMONY.....</u>	36
<u>VI. LEGAL ANALYSIS.....</u>	39
A. RULES FOR INTERPRETATION OF THE AGREEMENTS	39
B. THE RIGHT OF PREEMPTION UNDER FRENCH LAW	40
C. THE 20-DAY PREEMPTION PERIOD.....	41
1. COMMENCEMENT DATE OF THE PREEMPTION PERIOD.....	41
2. COMPUTATION OF THE 20-DAY PREEMPTION PERIOD.....	42
D. THE REQUIREMENT TO COMPLETE THE SALE WITHIN TEN DAYS	42
1. THE 55 DAY PERIOD IN THE SPA DOES NOT SUPERSEDE THE 10-DAY PERIOD IN THE GENERAL AGREEMENT	43
2. THE 10-DAY PERIOD WAS A MANDATORY ESSENTIAL CONDITION	44
E. FAILURE TO DEPOSIT THE DOWNPAYMENT WAS THE FAILURE OF A MATERIAL CONDITION UNDER THE SPA.....	45
<u>VII. COMPUTATION OF DAMAGES AND RELATED LAW.....</u>	46
<u>VIII. CONCLUSION</u>	51

TABLE OF AUTHORITIES

CASES AND CASE NOTES

CA Paris 18 février 2000, 25 ^{ch} .B, SA Finatral/SA Banque de Vizille	7
Cass. Civ. 3 eme , January 5, 1983, D 1983.617, note P. Jourdain; Cass Civ, 3 ^{ème} October 12, 1994, Defrénois 1995.738, obs. D. Mazeaud.....	44
Cass. civ. 3e, March 16, 1994, D 1994. 486, Fournier report; Rep Defrénois, 1994.1164, L. Aynès.....	39
Cass. com, 27 juin 1989 Barilla c/Rivoire et Carret-Lustucru et autres.....	31
Cass.civ. 1°, 19 novembre 1958 Office de Publicité du Petit Parisien c/ consorts Dupuy	31
Nederlandse Jurisprudentie (NJ; Dutch Case Law Report) 1981 No. 635.....	39
P. Voirin, JCP, 1954 I 1192	39

STATUTES AND OTHER RULES

Art. 1134, paragraph 3 C. civ.	40
Article 1165 of the Civil Code (French)	35
Article 6:2 (1) DCC.....	48
Article 6:96 (1) DCC	45
Article 6:97 DCC.....	47
Article 7:36 (1) DCC	46
European Principles of Contract Law.....	46
Section 10 of Chapter 1 of Book 6 (Articles 6:96 – 6:110) Dutch Civil Code	45
Unidroit Principles.....	46

OTHER AUTHORITIES

Asser-Hartkamp 4 I, No. 435 ff.....	50
Schadevergoeding (Deurvorst), art. 6:97, aant. 9	47
Schadevergoeding (Deurvorst), art. 97, aant. 28.....	46

TREATISES AND OTHER AUTHORITIES

"L'obligation de coopération dans l'exécution du contrat," <i>JCP</i> 1988 I 3318; F. Terré, Ph. Simler and Y. Lequette	41
Dictionnaire Joly, volume 5 of the Treatise on Corporate Law,	30
J. Derruppé, Rep. Dalloz Sociétés, see Preemption No. 50.....	39
<i>Les obligations</i> , Cujas, No. 622 et seq; J. Mestre, <i>RTD civ.</i> 1992.760, 1992.354, 1994.100, 346.)	41
<i>Les obligations</i> , Dalloz, 6e ed., 1996, No 414 et seq; Ph. Malaurie and L. Aynès	41
M. Dragot, <i>Le pacte de préférence</i> , Litec, 1988.....	39
Obligations, Dalloz, No. 187	39
Ph. Delebecque and F. Collart-Dutilleul, <i>Contrat civils et commerciaux</i> , <i>Dalloz</i> , 2e ed., No. 70	39
Ph. Malaurie and L. Aynes Special contracts Cujas 13 ^o ed , No 154	31
Ph. Malaurie and L. Aynès, op. cit, No. 794.....	39

Ph. Malaurie and L. Aynès, Special Contracts, ed. Cujas, 13 ed. No. 154	39
Y. Picod, <i>Le devoir de loyauté dans lexécution du contrat</i> , LGDJ, 1989	40

I. INTRODUCTION

This is Claimant Valvision's First Submission on the Merits in accordance with Procedural Order No. 3 and the Tribunal's Order of February 27, 2001.¹ Procedural Order No.3 required, among other things, that the memoranda of the parties shall:

[D]escribe the process of execution of the Sale and Purchase Agreement (C6) between 15 and 22 April 1999.

{A}ddress in depth all the legal consequences of the alleged non-compliance by Vision and the Minority Shareholders of contractual provisions relating to deadlines for the notification of the sale and the exercise of preemption rights.

[S]pecifically address the legal impact of the apparent non-compliance with the original contractual provisions of the General Agreement with respect to deadlines of notification to Minority Shareholders and the exercise of preemption rights.

II. SUMMARY

A. The Dispute

This arbitration arises from the breach by Respondent Vision Networks N.V. as Seller (hereinafter "Vision" or "KPN"²) of its obligations under an April 19, 1999 Sale and Purchase Agreement (the "SPA") with Claimant Valvision Telecommunications B.V. as Purchaser.³ Pursuant to the SPA, KPN agreed to sell to Valvision 73.775% of the shares of a French company, Reseaux Cables de France, S.A. ("RCF") for €13.4 million.⁴ Valvision thereupon paid to an escrow agent a ten per cent downpayment . The obligation of KPN to sell the shares to Claimant was subject only to a right of preemption held by RCF's minority shareholders contained in a preemption agreement dated December 4, 1999—the General Agreement ("GA.") The General Agreement provided tag-along rights to three minority shareholders.⁵ Had all the minority shareholder exercised all their tag

¹ Submitted herewith is the Claimant's Exhibit Binder No. 3. This Binder include all exhibits not supplied as a part of Claimant's Exhibit Binders Nos. 1 and 2. References to Claimant's Exhibits will be to C-1, C-2 etc. References to R-1, R-2 etc. shall be to Respondent's exhibits. References to transcript testimony shall be as follows: "VDH Tr." shall refer to the transcript of the September 25, 2000 testimony of Willem Van der Hoeven, "STUM Tr." to the transcript of Mr. Stumphius' testimony of September 21, 2000, and "DJ Tr." to the transcript of Mr. De Jong's testimony on February 21, 2001.

² Vision Networks N.V. ("Vision) is a subsidiary of Vision Networks Holdings B.V., which in turn is a subsidiary of Koninklijke KPN N.V. ("KPN.") Vision is a separate legal entity, but the officers and directors of Vision are KPN employees. Even on March 16, 1999, the seller was described by Credit Suisse First Boston to InterComm Holdings as KPN, not Vision. C-81. In this brief, we shall refer to KPN to include Vision N.V. and Vision B.V.

³ This arbitration was filed pursuant to Article 12.14 of the SPA.

⁴ NLG 29,612,541. The Dutch Guilder is the currency used in the SPA, but other agreements and transactions involved in this matter use the French Franc. For consistency, all currencies have been converted to Euros. See C-96 and C-98.

⁵ In April 1999 there were three minority shareholders of RCF: Brussels Securities S.A. ("Brussels"), Gillam S.A. ("Gillam") and SLF. SLF held 4.273% of the RCF shares. The GA considered SLF to be a "Non-Core

along rights, Claimant would have been obligated to purchase 100% of the shares for equity of € 18.23 million.⁶

Ultimately, the minority shareholders did not regularly exercise their preemption rights in the manner specified by the General Agreement.

Among other things, the minority shareholders failed to provide the preemptive notice within the requisite 20-day period, failed to close the transaction with 10-days after their notice of preemption, and failed to make the mandatory downpayment.

To cover up these breaches, KPN and the minority shareholder entered into a secret agreement wherein KPN waived these breaches (and later concealed the agreement from the French courts and, for over a year, from this arbitration.) KPN then maintained to Valvision that there had been a proper preemption despite the breaches, but refused to return the downpayment, claiming that Valvision would still be required to close if the minority shareholders eventually did not close.

KPN nonetheless proceeded to sell the RCF shares to the minority shareholders in violation of its obligations under the SPA. By selling the RCF shares to the minority shareholders, KPN breached the SPA and is consequently liable to Valvision for damages.⁷

RCF owned and operated nine different cable television systems throughout France. In June 1999 RCF had approximately 74,000 subscribers.⁸

Claimant Valvision owns three cable systems in mainland France through its French subsidiary, Valvision S.A.⁹ It was Claimant Valvision's intention to consolidate the operations of these cable systems with the RCF systems, achieve economies of scale, permit better management

Shareholder." KPN as the seller of RCF shares was considered to be a "Withdrawing Shareholder." Brussels and Gillam were part of a common group of companies sometimes referred to herein as "Brussels and Gillam." Together, they owned 21.988 % of the shares of RCF. See C-2, 00049, a description of the ownership prepared by KPN's investment banker, Credit Suisse First Boston ("CSFB.")

In Schedule D to the SPA (C-6 at 121), KPN identifies two other shareholders, GBL Participations and NS Satel. NS Satel is an affiliate of Gillam (see the GA, Ex. C-1, page 1.) GBL Participations is not mentioned in the GA. On April 29, 1999, KPN sent a Notice to Groupe Bruxelles Lambert, apparently "GBL" Brussels and Gillam are a part of Groupe Bruxelles Lambert.

At the September 25, 2000 hearing, the Tribunal asked KPN for copies of the shareholder records of RCF, but KPN and its counsel claim to be unable to locate any copies of RCF shareholder records.

⁶ RCF's long-term debt was approximately €37 million as represented by CSFB in its offering package. C-2, 00032.

The "enterprise value" of RCF as reflected in the April 19, 1999 SPA is the value the cash purchase price for 100% of the shares plus the long-term debt—€55.3 million. At the exchange rate in early 1999, this would have been approximately US \$64.1 million. See C-96 and C-98.

⁷ Further, for another five months, KPN refused to authorize the return of the downpayment unless Valvision released its claims against KPN. KPN only released these funds in November 1999 because it did not wish to be asked to justify its indefensible position to this Arbitration Tribunal.

⁸ The CSFB information package represented that in August, 1998, there were approximately 72,000 customers. C-2, 00031. By June, 1999, this number had increased to 74,000. See C-95, C-77 p. 1, C-69, p. 000672

⁹ Claimant Valvision is part of the Innovative Group of companies. In June 1999 the Innovative Group purchased the Martinique cable system and in January, 2000, the Guadeloupe cable system. Claimant Valvision telecommunications B.V purchased Valvision S.A. in December 1998.

of the geographically dispersed system, and enhance the value of both RCF and the existing three Valvision systems.¹⁰ The loss of the RCF systems was a major blow to Valvision.

In the cable television industry, cable systems acquisitions commonly are compared based upon the price on a per subscriber ("per plug") basis. Under the SPA, Valvision could have acquired the RCF systems at a cost of €747 a subscriber. On April 19, 1999, the day that Valvision signed the SPA, InterComm Holdings offered KPN €1023 a subscriber. On June 30, 1999 UPC was able to acquire RCF for €871 a subscriber.

When KPN breached the contract on June 29, 1999 by selling to the minority shareholders, the best evidence of the minimum value of the RCF shares at that time was the InterComm offer at €1023 per subscriber. Even that figure is low as compared to other prices being paid for French and European cable systems at the time.¹¹ Indeed, InterComm Holdings received €3300 per subscriber from UPC for InterComm France which was certainly not the highest price paid for European cable companies in 1999-2000. The average price paid for cable companies in France and Europe in 1999 was over €1600 per subscriber.

Valvision's contract right to purchase RCF at €747 per subscriber was extremely valuable, both on a valuation basis, as well as a synergistic complement to Claimant Valvision's other holdings.

Had Valvision completed the purchase of RCF at €747, the Tribunal must consider that Valvision may itself have resold to InterComm, UPC, or another purchaser. Valvision may have wished to seize for itself the gains that KPN wrongfully permitted the minority shareholders and UPC to take.

KPN was obligated to sell those shares to Valvision, subject only to the proper and complete exercise of the preemptive rights.

Under the French law of "droit de préemption," a right of preemption is a very serious limitation on the right to own and transfer shares of a corporation. Historically, French courts have looked with disfavor upon rights of preemption. Accordingly, the legal instruments, which give rise to the preemption right, are to be interpreted strictly in favor of the buyer whose rights are subject to being taken away.¹²

The minority shareholders never properly and regularly exercised the preemptive right under the GA. Nonetheless, KPN went ahead and transferred the shares to the minority shareholders. KPN colluded with the minority shareholders, Brussels Securities S.A. ("Brussels"), Gillam S.A. ("Gillam"), to facilitate their purchase of the RCF shares and then to simultaneously flip the shares to UPC for a substantial profit, in a transaction tantamount to the assignment of the preemptive right to UPC.

¹⁰ Exhibit C-2, 00064 is a map showing the location of the RCF systems.

¹¹ In March 1999 UPC announced the acquisition of Time Warner France which included Gerard Le Febvre's company Rhone Vision Cable at €1575 per subscriber. See C-96. C-98. Gerard Le Febvre was also a principal in InterComm Holdings. Later in 1999 UPC announced its deal to buy InterComm's French systems at €3448 a subscriber. The average price paid for cable systems in Europe in 1999-2000 was €1,695 compared to €4,854 in the United States. See C-95, p. 3.

¹² A recent decision rendered by the Court of Appeal of Paris (CA Paris 18 février 2000, 25°ch.B, SA Finatral/SA Banque de Vizille) states unequivocally : "...considérant que le pacte d'actionnaires qui contient un droit de préemption doit être interprété restrictivement dès lors qu'il est une limite à la libre négociation des actions qui est de principe ..." (whereas a shareholders agreement containing a preemption right must be interpreted restrictively inasmuch as it constitutes a restraint upon the right to freely transfer shares, which right must be recognized as a matter of principle ...)

KPN's acts of collusion included:

Providing advance notice of the sale to the minority shareholders.

Delaying the giving of the Notification of the sale.

Waiving the strict application of the 20-day notice period.

Waiving the requirement of the preempting shareholders to provide a downpayment.

Waiving the requirement to close within ten days

Proceeding with the sale notwithstanding the notice of breach from Valvision.

Allowing, in substance, an assignment of the preemptive right in violation of the General Agreement.

After the transfer to the minority shareholder, colluding with the minority shareholders to conceal pertinent information from the French courts such as the secret letter agreement of June 17, 1999.

B. Significant Provisions of the General Agreement:

The principal provisions of the General Agreement insofar as they are relevant to this dispute are as follows¹³:

Definition	p. 4	Definitions of Business Day—"any day on which banks are open for business in Paris France." ¹⁴
Definition	p. 5	Withdrawing Party.
4.3.1a)	p. 8	Preemptive right provided to Core Shareholders.
4.3.1 d)	p. 9	Notice Requirement by Withdrawing Party to Core Shareholders with reference to sale and the "third party purchaser"
4.3.1 d)	p. 9, last ¶	Requirement that there be "an irrevocable commitment by the third party purchaser to purchase the Shares which the Parties exercising their tag along rights would have the right to sell."
4.3.2 a) (1)	p. 10, ¶ 3.	20 Business Days after 4.3.1 (d) notice for core shareholders to notify of the intention to preempt, otherwise waiver of the right.
4.3.2 b)	p 12, ¶ 1,	Requirement that the preempting shareholder be subject to the terms of the third party agreement.
4.3.2. b)	p. 12 ¶. 3	Requirement that the "sale resulting from the exercise of the preemptive right and the payment of the purchase price <u>shall</u> take place within (10) Business Days following the exercise of such right."
4.3.2 b)	p. 12 ¶. 4	Sale to the third party purchaser may take place up to three months after the expiration of the 20-day notification period.
4.3.2 d)	p. 12	Shares cannot be transferred to the third party purchaser unless the third party purchaser "accepted in writing all of the rights and obligations" of the General Agreement.

¹³ Exhibit C-89 is an abstract of significant provisions of the General Agreement. Exhibit C-88 is an abstract of significant provisions of the Sale and Purchase Agreement.

¹⁴ Banks in Paris are open for business on Saturdays and thus Saturday is a Business Day under the General Agreement.

10	p. 16	Notices to be sent registered mail, with acknowledgment of receipt. Deemed sent on the date of mailing if preceded by fax, otherwise deemed sent on the day of receipt.
15	p. 21	Assignment of preemption right prohibited.
16	p. 21	Agreement governed by French Law.

C. Significant provisions of the SPA Agreement

3.1		"At the date of the Agreement, Purchaser will provide an earnest money deposit of NLG 3,940,000 ... the 'Down payment.'"
3.3		Provisions relating to Minority Rights.
3.3.1		Reference to obligations under the General Agreement.
3.3.1		Seller "shall cause the Notification Date to occur within three business days of the date of this Agreement."
3.3.2		Provides for termination of the S&P Agreement and return of the Down payment "should the Minority Shareholders exercise their Minority Rights (such that any or all French Shares are sold and transferred to, and paid for by, the Minority Shareholders or any one of them ...)"
3.3.3		Purchaser agrees to "accept all of the shares that the Minority Shareholders may offer to the Purchaser pursuant to their Minority Rights (the 'Minority Rights')."
3.3.3		Purchaser undertakes "not at any time to discuss or negotiate with the Minority Shareholders any matters relating to the Minority Rights ..."
4.5		Parties commit to use best endeavours to close.
13.12		"The Agreement shall be governed and construed in accordance with the laws of the Netherlands."
13.4		Arbitration Provisions.
Whereas Clause		Execution of the agreement has been made "on the date first above written" [i.e., April 19, 1999.]
Schedule D Defined Terms		"Day means a calendar day."
Schedule D Defined Terms		"General Agreement" defined.
Schedule D Defined Terms		"Minority rights means the pre-emptive and tag along rights of the Minority Shareholders under the General Agreement."
Schedule D Defined Terms		"Minority Shareholders" defined.
Schedule D Defined Terms		"Notification means the notification sent to the Minority Shareholders as meant in article 4.3.1.d of the General Agreement."

D. Summary of the Key Dates

The evidence presented to the Tribunal shows the following significant dates:

January 20, 1999. Negotiations between KPN and Valvision break down over price and KPN asks for return of due diligence material.

February 17, 1999. UPC completes an IPO for €1.2 billion on the Amsterdam stock exchange. Press release on February 11, 1999. C-93. CSFB was aware of the IPO. DJ at 11.¹⁵

March, 1999. (Early). CSFB contacts Valvision and ask to start negotiations again.

March 9, 1999. Willem Van der Hoeven of KPN informs Brussels and Gillam of the terms of the deal being concluded with Claimant Valvision at the Strategic Committee meeting held to discharge Mr. Esgain. R-19

March 19, 1999. CSFB invites Valvision to Brussels and Rotterdam (C-75) and on the same day sends complete RCF information package to InterComm Holdings. C-83.

March 23-24, 1999. Valvision and KPN complete negotiations in Rotterdam.

March 29, 1999. UPC announces acquisition of Rhone Vision Cable, a company for which Gerard Le Febvre is President. C-79, P. 5. Le Febvre at this time was also President of Cable Services of France, which is owned by InterComm Holdings. C-79.

March 31, 1999. InterComm's investment bankers ask CSFB to call as soon as possible. C-84.

April 11, 1999. Valvision advises KPN that there was agreement on all terms and conditions and that the SPA should be finalized for execution. C-75, P. 26.

April 12, 1999. KPN discharges Esgain and Moineville becomes head of RCF.

April 15, 1999. KPN sends SPA to Valvision for execution. Valvision asks to receive all exhibits prior to execution of documents.

April 19, 1999. The "date" of the Share and Purchase Agreement was April 19, 1999, which was the date that Valvision signed and returned the agreement to KPN and was the "date first above written."¹⁶

April 19, 1999. InterComm Holdings submits bid for RCF to CSFB. R-16, C-85.

April 21, 1999. Le Febvre on behalf of InterComm contacts minority shareholders. R-17.

¹⁵ Bruno Moineville on June 2, 1999 while addressing the Comite d'Enterprise was careful to let the RCF employees know about the UPC IPO. C-16. The UPC financing was very big news in the European cable industry.

¹⁶ Valvision never contended that the date of the SPA was April 22, 1999. See page 2 of Claimant's Reply and Answer to Counterclaim dated August 13, 1999: "By referring to the agreement as the April 22 Agreement, Valvision Telecommunications does not agree that the proper date of the agreement is April 22." Brussels, Gillam, and UPC all considered the agreement to have an effective date of April 19, 1999. See Whereas Clause C, Exhibit C-17 ("pursuant to the terms and conditions of the share purchase agreement dated 19 April 1999.")

April 22, 1999. InterComm directly contacts KPN and Minority Shareholders with letter of intent. R-18.

April 22, 1999. Ronnie Behar of CSFB and Mearing-Smith of InterComm have telephone conversation and Mearing-Smiths sends further letter to CSFB. (or April 23, 1999). C-87.

April 22, 1999. KPN as Seller signed the SPA and returned it to Valvision as Purchaser.

April 27, 1999. Date by which KPN was required to provided Notification to minority shareholders assuming April 22 contract date. With an April 19 contract date, Notification was required on April 22.

April 29, 1999. Written Notification Date by KPN to minority shareholder. The Notification was faxed to the minority shareholders. C-51, 1-3, 00520 and 00536, Item 7 on page 00532 and 00547.

May 27, 1999. Date by which minority shareholders were required to exercise preemption -- Twenty Business Day from April 29, 1999.¹⁷

May 31, 1999. Minority Shareholders give notice of the exercise of preemptive rights by the.

May 31, 1999. No downpayment. Brussels and Gillam as preempting shareholders should have made a 10% down payment on or about the date of notice of preemption, May 31, 1999, as required by the SPA, Article 3.1. They did not do so.

June 2, 1999. RCF holds Comite d'Enteprise meeting chaired by Moineville. V-16.

June 7, 1999, Mediareaux Marne S. A., a subsidiary of UPC, signs an agreement to purchase 96.735% of the shares of RCF from Brussels and Gillam contingent upon Brussels and Gillam purchasing of the shares from KPN and a downpayment deposit is made by UPC. C-17.

June 11, 1999. Ten "Business Days" after May 31, 1999. The "sale resulting from the exercise of the preemptive right and the payment of the price" was required to take place ten "Business Days" after notice. GA 4.3.2 b).

June 17, 1999. KPN and Brussels and Gillam entered into a secret letter agreement waiving existing their defaults by in making a downpayment and closing within ten days. R-21.

June 17, 1999. UPC issues press release announcing their purchase of RCF—ten days after they signed their purchase agreement. C-77, p.1.

June 17-18, 1999. Sale and purchase agreement entered into between Brussels and Gillam as buyers and KPN as sellers. C-17.

¹⁷ Business Days under the GA is defined as "any day on which banks are open for business in Paris (France). C-1, p.4.

June 23, 1999. KPN advises Valvision that the Brussels and Gillam had preempted, but refuses to return the downpayment and says that if Brussels and Gillam did not close, then KPN would require Valvision under the SPA to purchase the RCF shares. C-26.

June 29, 1999. Valvision initiates this arbitration proceeding.

June 29, 1999. Valvision obtains a French court order seizing the RCF shares.

June 29, 1999. The RCF shares are transferred by KPN to Brussels and Gillam while a valid order of seizure was in effect.

June 30, 1999. The Brussels and Gillam transfer the RCF shares to UPC.

July 23, 1999. Rhone Vision Cable accepts resignation of Gerard Le Febvre subject to completion of acquisition of Rhone Vision by UPC. C-79.

August 10, 1999. UPC and InterComm enter into chello broadband deal in France. C-77, P. 6.

August 23, 1999. Telecommunication newsletter publishes rumor that UPC to acquire InterComm France. C-77, P. 9.

August 23, 1999. UPC completes acquisition of Rhone Vision Cable, a company for which Gerard Le Febvre was President. C-79.

December 22, 1999. Press release--UPC is to acquire InterComm France. Acquisition is completed in February 2000 with UPC paying €100 million. C-77, p. 12.

Claimant has prepared calendars for January through June 1999 with these and other dates indicated. These calendars are found at Exhibit C-91.

E. Specifics of the Preemptive Right In the General Agreement

The General Agreement describes three time periods that relate to this dispute:

The minority shareholders were given a 20 "Business Day" period to notify the Withdrawing Party of their intention to preempt the shares" after notification by the Withdrawing Party of a proposed transfer to a Third Party Purchaser. The RCF minority shareholders did not provide their notices of preemption within this 20 Business Day period. GA 4.3.1 a) (1). Failure to provide timely notice is an express waiver of the preemption right under the GA.

If a minority shareholder did exercise the preemptive right, then the "sale resulting from the exercise of the preemptive right and the payment of the price shall take place" within (10) Business Days following the notification of the intention to exercise the right. The RCF minority shareholders did not complete the sale and the payment of the purchase price within the ten-day period after their untimely notice of preemption. GA 4.3.2 b)

If the preemptive right was not exercised, the General Agreement required that the transfer of shares to the "Third Party Purchaser" (i.e., Claimant Valvision) was to take place within three (3) months after expiration of the preemptive right period. GA 4.3.2 b). Thus, whereas shareholders exercising their preemptive rights were required to close within 10 Business Days after the exercise of preemption, the General Agreement expressly allowed the Third Party Purchaser a three-month period .

Preemptive rights are by their nature an inhibition on the ability of a seller to sale shares. A buyer will ordinarily not enter into a purchase agreements where the preemptive rights are ill defined or provide excessive time periods for the consummation of the preemptive right.

The time periods afforded to a holder of a preemptive right are normally limited in duration; otherwise the preemptive right would substantially diminish the willingness of buyers to enter into sales agreement subject to these rights. In entering into the SPA, Claimant Valvision relied upon the specific and limited time periods afforded in the General Agreement and in the SPA. Preemptive rights are fixed and specific and are not a fluid arrangement.¹⁸

Finally, the General Agreement required that the exercise of the preemptive right would be made subject to the same terms and conditions of the agreement with the Third Party Purchaser, that is, the SPA. French law also imposes this obligation on a preempting party. Under French law, the preemptive right effectively places the preemptor in the exact same position of the chosen transferee: the preemptor must, therefore, observe all the conditions of the contract anticipated by the transferor and the chosen transferee. It is a preferential right under the same conditions.

F. Relationship Between the SPA and the General Agreement

The SPA and the General Agreement are closely interrelated. Indeed, the SPA was tailored to the requirements of the General Agreement.

KPN drafted the SPA so that it would not be characterized as a Complex Transaction under the GA.¹⁹ Thus there were few conditions to the closing, other than the lapse of time and the giving of notices to the French municipalities of a change in ownership.. The SPA makes specific reference to the rights of the minority shareholders and to the General Agreement. The Purchaser agreed to purchase any shares tendered the tag-along rights. Similarly, KPN tailored the time

¹⁸ To further protect the buyer, the SPA required the Seller to provide the Notification of a sale to the non-withdrawing shareholders within three days after the date of the SPA, so as to limit the time provided to the minority shareholders to exercise and consummate their preemptive right.

¹⁹ KPN, as well as the minority shareholder, have not ever contended that the SPA transaction was a Complex Transaction. Respondent KPN drafted the SPA and the initial draft was supplied to Claimant on December 4, 1998. (C-70).

The SPA Agreement contained no substantial condition precedents outside the control of the KPN: the purchase price was a set price. Rather than require approvals from government agencies such as the French Consel Superieur de l'Audiovisuel (CSA) and municipalities, the SPA agreement rather called for notices to those entities. Accordingly, when applying the General Agreement, the provisions applying to "Non-Complex Transactions" governs.

period in which Valvision was required to close so that it was consistent with the time period provided in the GA.²⁰

The minority shareholders subjected themselves to the terms and conditions of the SPA upon their exercise of their notice of preemption.²¹ The SPA required the buyer Valvision to provide a 10% downpayment when the SPA was signed and the minority shareholders were subject to that requirement. The SPA provisions on termination of the SPA and return of the escrow in the event of preemption were similarly part of the terms and conditions to which the minority shareholder agreed to be bound upon preemption.²²

III. PRIOR PROCEEDINGS

This arbitration was commenced on June 29, 1999. On June 29 Valvision initiated a proceeding in the French courts to seize the shares of RCF pending the completion of the arbitration and the seizure was issued. C-32. KPN, UPC, Brussels, and Gillam then made transfers on the records of RCF notwithstanding the court seizure. KPN, UPC, Brussels and Gillam, appealed the initial seizure of the shares on technical procedural issues and the appeal vacated the initial seizure. C-45.

In the meantime, Valvision sought and obtained another seizure in the French courts, complying with the technical objections of the French appellate court. C-46, C-47. Once again, KPN, UPC, Brussels and Gillam appealed. This time, the appellate court overturned the seizure, but not on procedural grounds. C-72. The court appeared to be reluctant to have the shares seized and appeared to accept the arguments of the KPN, UPC, Brussels and Gillam that it would be inappropriate to hinder the operation of RCF while a lengthy arbitration proceeded. The court acknowledged that there was a serious controversy, seemed to doubt the ability of Valvision to reverse the transaction that had occurred and in any event seemed to believe that Valvision could always obtain an award for damages. That decision of the court is on appeal before the Cour de Cassation. C-68.

In the process of answering the Claim and providing a statement of claims, the parties exchanged several lengthy briefs and statements. The Terms of Reference were issued on June 15,

²⁰ The Period allowed to Valvision to close under the SPA was tailored to the time periods allowed to the minority shareholder to exercise their rights under the GA. The December 11, 1998 memorandum from counsel for KPN (C-4) clearly shows that this was what was in the minds of at least KPN when it first proposed a 50 day period and then later proposed a 70 day period, and then ultimately returned to a 50 day period in the final agreement. Disregarding for a moment the differences in definition of Business Days, a preempting shareholder was provided 30-days after the Notification Date to close (from the Notification Date to the end of the 10-day period).

Only after the end of the 10-day period would Valvision know if it was required to close—and that would be 30 days after the Notification Date. Since Valvision had a total of 55 days from the Notification Date to close, that would leave it with only 25 more days. See Stumphius Letter of May 19, 1999, C-12.

²¹ The requirement that the Notification Date occur within three days of the date of the SPA was another term and condition to which a preempting shareholder became bound upon exercise of the preemptive right. Valvision negotiated the 3-day notice provision in 3.3.1 of the SPA. This limitation is not found in KPN's initial draft on December 4, 1998. See C-70, 000685. If, for example, had KPN delayed three weeks in formally notifying the minority shareholders, could minority shareholders who already knew of the sale be permitted to avail themselves of such an extended time period?

²² This requirement was drafted by KPN and is found in the initial draft provided by KPN on December 4, 1998. See C-70, 000685.

2000²³ and the parties were invited to submit to the Tribunal documents and testimony that were desired from the other party. Valvision asked for the testimony of Mr. Van der Hoeven and Mr. Wunderink from KPN. KPN then offered make Mr. Van der Hoeven available while concealing from the tribunal Mr. Wunderink's true role. The Tribunal then determined to hear the testimony of only three of the witnesses sought by Claimant and set a witness hearing for the testimony of Van der Hoeven of KPN, Ewout Stumphius, counsel for KPN, and Ronnie Behar of Credit Suisse First Boston on the assumption that these were the principal parties involved in the negotiations. The Tribunal did not act on the request of Valvision for the testimony of Mr. Wunderink.²⁴

The first witness hearing was held on September 25, 2000 in Brussels. Mr. Behar did not appear because CSFB refused to testify without a subpoena. Ultimately, another hearing was held on February 21, 2001 in London after a subpoena was served. CSFB was extremely uncooperative and threw up every objection to prevent Mr. De Jong from testifying or from supplying the requested documents. Only Mr. De Jong from CSFB appeared in that CSFB and KPN claimed that Mr. Behar was in Singapore.

IV. THE FACTS

A. KPN Obtains Controlling Interest in RCF in 1995-1996

In December 1995 and January 1996 KPN, the parent company of Vision Networks, obtained a controlling interest in RCF from the then existing RCF shareholders including Gillam and Brussels Securities.²⁵ The General Agreement of December 4, 1995 was entered into at that time as a part of KPN's agreement to provide additional capital.²⁶ The General Agreement was one of several agreements entered into on December 4, 1995 amongst KPN, Brussels, and Gillam. There also was a Shareholders Agreement of the same date (C-90²⁷) and a Construction Agreement (R-30.)

The Construction Agreement was supplied by KPN at the September 2000 hearing in Brussels as part of Exhibit C-30, Schedules to the General Agreement. Claimant was unable to

²³ The Terms of Reference do not make reference to the secret letter agreement of June 17, 1999 because KPN were still concealing that document.

²⁴ As discussed below, at the September 25, 2000 hearing in Brussels, Mr. Van der Hoeven claimed to be in charge of CSFB and the sale of RCF. But, Mr. De Jong was emphatic that it was Mr. Wunderink who was running things for KPN.

²⁵ Coincidentally, Patrick Drahi, who in 1999 on behalf of UPC/Mediaset would lead the effort to seize control of the RCF shares, was the broker who arranged the transaction. (VDH Tr. at 64-66). Drahi knew the minority shareholders and KPN and was familiar with RCF and the preemption contract. See Gordon Affidavit, C-97. VDH at 65-66.

²⁶ The preamble to the General Agreement states:

"The current shareholders of the Company believe that the company will benefit greatly from the participation of an external investor who can have a positive influence on the future development of RCF and thus would like to offer to KPN the opportunity to become shareholder of the Company."

²⁷ The Shareholders Agreement provides for the Strategic Committee meetings, one of which was held March 9, 1999. Under the Shareholders Agreement, KPN had an option to purchase the shares held by Brussels and Gillam at a price of no less than .50 FF per share or the fair market value of the shares. (Article 4.4 of C-90.)

review this Exhibit until after the hearing.²⁸ This Agreement is significant: it reveals another business relationship between KPN, Brussels and Gillam that KPN wished to conceal from this Tribunal. Brussels and Gillam indemnified KPN for the failure to complete the RCF cable system network and to comply with local franchise agreements, which required that the networks be completed. In June 1999, Brussels and Gillam in fact had failed to meet this commitment.²⁹

Brussels and Gillam had constructed the RCF network and the construction was financed by loans principally from Group Brussels Lambert. Mr. Esgain, the president of RCF, had previously worked for Gillam. C-2 (Rev.) at p. 42.

KPN as the new investor and majority did not wish to encumber its majority shares with open-ended preemption rights which would impair the marketability of its shares should such time come that KPN wished to sell its interests. The General Agreement, although it did provide a right of first refusal to the minority shareholders, substantially limited those rights. The General Agreement also prohibited the assignment of this right.

KPN and Vision decided to sell RCF later in 1996 (VDH Tr. at 73). KPN retained Credit Suisse First Boston for that purpose and by April 1997, CSFB had already prepared a Information package for the sale of RCF.

Credit Suisse First Boston acted as to the sole contact with potential purchasers and conducted all negotiations on behalf of KPN. The Managing Director in charge was Adam De Jong based in the London office of CSFB; Ronnie Behar conducted many of the day-to-day activities and was supervised by Mr. De Jong and shared a secretary with Mr. De Jong. (DJ Tr. at 5-6).

B. Valvision and KPN Commence Negotiations—October 1998

CSFB in 1997 and 1998 was not very successful in selling RCF. By the time that Valvision showed up in October 1998, CSFB and KPN and its subsidiary KPN had never received even one written offer for RCF. (VDH Tr. at 76). In late 1998, Valvision was the only serious candidate. (VDH Tr. at 112). (STUM Tr. at 52).

In late 1998, prices for cable companies were still low and KPN was unable to obtain what they considered to be a reasonable price. (VDH Tr. at 111). There had already been an attempt at

²⁸ Since the Construction Agreement is not a schedule to the General Agreement, it seems that KPN accidentally included the document.

²⁹ KPN on December 4 1995 also entered into another significant agreement with Brussels and Gillam and other shareholders: the Agreement Relating to the Construction of the Cable Networks. The shareholder agreed to indemnify KPN for the costs of completing cable systems in certain areas where RCF operated. This document is included in R-30, Schedules to the General Agreement, as the last document.

Van der Hoeven did not offer any testimony as to how Brussels and Gillam satisfied their obligations under the Construction Agreement.

Unquestionably, the build out under the Construction Agreement had not been completed and there was a claim by one of the municipalities for the failure to comply with the buildup. The SPA exhibits show that substantial construction including Antibes and La Roche sur Lyon had not been completed as of 1999. EX -C-6, Schedule R,00163m 00168; Ex R-22 See 500341. One of the items of disclosed RCF litigation in the SPA was a FFr4,235,000 claim brought by the Ville d'Antibes for penalties relating to the failure to complete construction in Antibes, and, Brussels and Gillam were liable to KPN and Vision for this claim! R-23, 500502, 500500, 500134.

a management buyout at RCF, according to Van der Hoeven, but it did not work out. (VDH Tr. at 111.) Presumably, Van der Hoeven was referring to a buyout by Moineville and/or Esgain.³⁰

As explained in the Witness Statement of John Raynor (C-94), there were a number of factors that made RCF less attractive to other bidders, but still attractive to Valvision. In early 1999, there were other cable companies available at the time that were more attractive to the bidders than in the market, and the preemptive right diminished the value of the RCF shares. The presence of Mr. Esgain as the chief executive of RCF was also a negative factor. KPN's unwillingness to discharge Mr. Esgain was one open issue at the time of the negotiation breakdown.

Valvision commenced its due diligence in early December 1998 in Amsterdam and submitted a letter of intent to KPN on December 16, 1998 for \$60 million³¹ (R-33) and proceeded with due diligence. KPN wished to have the buyer complete due diligence prior to signing the agreement. (C-75, p. 2-15).

KPN acknowledged that Valvision's offer was "half of our book value" and that KPN was pleased to get the offer. (VDH Tr. at 111, DJ Tr. at 46.)

C. Negotiations on January, 1999—Breakdown

A negotiation session was scheduled to take place in Rotterdam on January 19, 1999 (C-75, p. 16, C-6, 00168). Valvisio n's team flew in from the United States with the full expectation to negotiate a final agreement for execution. (C75, p.16). At these negotiations, the principals of KPN did not appear; rather negotiations were conducted on behalf of the seller by Mr. Behar and Mr. De Jong of CSFB and by Mr. Stumphius of Vision/KPN's law firm.

After substantial agreement was made on the terms of the agreement, KPN insisted on increasing the price above the \$60 million for debt and equity offered by Valvision. The Valvis ion team had come to Rotterdam assuming the \$60 million price-- Valvision made a last offer of the equivalent of US \$64 million and then decided to discontinue negotiations when KPN wanted more. (Raynor Affidavit, C- 94); (VDH Tr. at 72-73); (STUM Tr. at 73.)

D. Resumption of Negotiations in March, 1999

In early March, 1999, Ronnie Behar of CSFB contacted Valvision and asked to start negotiations again. He said that KPN would sell RCF at the price last offered by Valvision in January, and that KPN would take care of the Esgain situation. (VDH Tr. at 75; Raynor Affidavit C-94, STUM Tr. at 38) and negotiations commenced again. Valvision agreed with CSFB to return to Europe and finish up the negotiation of the Sale and Purchase Agreement. In addition, Valvisio n asked to meet with the RCF lenders.

The KPN witnesses at the hearings refused to discuss whether the deal was shopped around during the break in negotiations between January 20 and early March when Behar reinitiated negotiations with Valvision. Mr. Stumphius flatly refused to state whether he was aware of any

³⁰ De Jong said he was aware that "they had ambitions." DJ Tr. at 56.

³¹ The \$60 million was the "enterprise value" and included equity and long-term debt on the books of RCF. By January 19, 1999, Valvision's final offer was closer to \$64 million at the exchange rate then in effect. C-96.

efforts made by CSFB to obtain other buyers.³² Mr. Van der Hoeven claimed that no attempts were made to find another buyer during this period (VDH Tr. Van der Hoeven at 74). He stated that he did not know to whom CSFB talked during the interim (id. at 76) but seemed to know that CSFB talked to InterComm prior to March 9, but was not clear enough to comment on that. In short, neither Van der Hoeven nor Stumphius admitted to any knowledge of what CSFB did do in this period and would not even explain why KPN suddenly agreed in March to accept the purchase price initially offered by RCF.

Mr. De Jong said that no efforts were made to shop the deal during the interim period. He said that CSFB did not approach UPC notwithstanding that UPC had just completed a bond offering in excess of €1.2 billion for acquisitions. CSFB still did not contact UPC even after CSFB started to negotiate with InterComm. C-93. When UPC announced that it was acquiring Time Warner in late March, even that did not stimulate CSFB to contact UPC, yet CSFB all along was negotiating with InterComm. Although CSFB and KPN later claimed that InterComm did not have the financial resources to purchase RCF, they obviously knew UPC had €1.2 billion of resources, but even then they say they did not contact UPC.

Van der Hoeven's testimony about UPC was even more curious. He was aware that UPC had done a major public offering in the spring of 1999 and that UPC was buying "everything." (VDH Tr. 92). He did not know if UPC had been solicited in the past to purchase RCF. (VDH Tr. at 63). When asked whether anyone had approached UPC in March or April, he responded "not to my knowledge" and then his counsel interrupted "It's a very delicate question Chairman, I think." (VDH Tr. at 99). No one will admit they spoke to UPC and no one will deny someone from CSFB spoke to UPC. Wunderink did not testify, Behar did not testify, Moineville did not testify, and Stumphius refused to answer questions on this because it would hurt his client (not, on the ground of attorney-client privilege) and then said that this was "a very delicate question."

Van der Hoeven did state that in 1998, UPC was not a company on the list. (VDH Tr. at 111).

De Jong's explanation as to why UPC was not contacted in February to April may sound plausible to an outsider: De Jong offered various theories: UPC already knew about RCF, CSFB did not want to shop the property around, CSFB did not want to risk the deal with Valvision, etc. However, there is one flaw in his argument: from at least March 1999 through April 22, 1999, CSFB and KPN were also negotiating with InterComm Holdings and CSFB seemed more than willing to show the RCF property and risk the deal with Valvision. So, given that is was public knowledge that UPC had €1.2 billion to spend and had announced other acquisitions including that of Le Febvre's Rhone Vision, de Jong and Van der Hoeven's explanation are not plausible.

Van der Hoeven did acknowledge that CSFB had held discussion with UPC about buying KPN's Polish and Slovakian properties, but that at present CSFB was not in discussion with UPC. (VDH Tr. at 60-61).

³² Mr. Stumphius refused, not on the basis of attorney client privilege, but on the basis that it "relates to my client's position," although he did describe conversations with CSFB when it favored his client. (STUM Tr. at 38.)

E. March 9, 1999—KPN Notifies Brussels and Gillam of Terms of Deal With Valvision

When Behar reinitiated negotiations on behalf of KPN in March, it was with the understanding that KPN would accept the purchase price offered by Valvision in January as acknowledged by Van der Hoeven (VDH Tr. at 73),

- Q. Which is Valvision in January; you wanted more, they walked away. You came back in March, and it was 17 the same price that Valvision had offered?
A. Yes, the US \$ 60 million for 100%.
Q. Yes, \$ 60 million includes not only the equity, but the value of the debt?
A. The bank loans yeah.

Knowing that Valvision was returning to Europe with its negotiation team, KPN called a meeting on March 9, 1999 of the "strategic committee" of RCF. (R-19). At the meeting were Mr. Van der Hoeven (Vision/KPN), Mr. De Vos (Brussels Securities) , and Mr. Gillard (Gillard).³³

The minutes of the meeting show that two matters were discussed (1) the termination of Philippe Esgain, the Managing Director of RCF and (2) the proposed acquisition of RCF by Valvision. The essential term of the Valvision proposal and a description of Valvision were provided by Mr. Van der Hoeven to Mr. De Vos and Mr. Gillard. Because there were to be no substantial conditions to the obligation of Valvision to close (the SPA was not subject to due diligence and was not even subject to approval by the CSA, the French regulatory agency) the only essential term was price. Valvision had made the termination of Esgain a condition to the purchase of RCF. Mr. Esgain had been appointed Chief Executive Officer of RCF in 1993—previously, Mr. Esgain had spent seven years with Gillard where he had been Head of Business Development. C-2 (Rev.) at p. 42. See VDH Tr. 102 et seq.

In disclosing the inside information to De Vos and Gillard, Mr. Van der Hoeven violated the confidentiality owed to Valvision "the offer is conditional on the existence and terms of this letter not being disclosed to any third party." R-33. Mr. Van der Hoeven had provided the minority shareholders with advance notice and inside information of the financial terms of the deal agreed to in principle with Valvision. Indeed, Van der Hoeven provided all the essential information required under the notice provision of the General Agreement. Mr. Van der Hoeven thereby accorded De Vos and Gillard with the opportunity to begin to find a take-out buyer and effectively extended the time afforded to a minority shareholder to decide whether to exercise the right of preemption.

Mr. Van der Hoeven's justifications for this activity was that the Strategic Committee had to be consulted on all management matters under its agreement with De Vos and Esgain, that the agreement under negotiation required the termination of Mr. Esgain, and therefore he was compelled to bring the matter of Mr. Esgain's discharge to the committee. Van der Hoeven, admitted, however, that KPN could, in the end, discharge Esgain over the objections of De Vos and Gillard. (VDH Tr. at 68). Mr. Van der Hoeven did not explain why this meeting and discussion could not have waited until the official notification of the sale to the minority shareholders if not later. This would have been the proper, ethical and legal thing to do and the SPA required only that Mr. Esgain

³³ This meeting was apparently called pursuant to the Shareholder Agreement, C-90.

be discharged prior to the closing.. Further, Mr. Esgain was in fact discharged a month later on April 12, 1999.³⁴

Mr. Van der Hoeven could provide no reason as to why he felt compelled to provide De Vos and Gillard with details of the pending deal with Valvision. (*Id.*) ("But the way we were working together, it would have been normal, it would not have been very polite and not correct." (VDH Tr. at 68.)

On March 19, 1999, Behar and DeJong of CSFB notified Valvision of a meeting to be held in Brussels with RCF's lenders. C-75, p. 19. The parties were then to continue to Rotterdam to finish up negotiating the final details of the Sale and Purchase Agreement. The negotiation of the wording of the SPA had been substantially completed during the negotiations in January.

The lenders meeting was to be held on March 22, 1999 in Brussels to discuss whether the lenders would consider extending a one-year moratorium on debt repayments should Valvision purchase RCF. (Subsequently, Valvision waived its request for a moratorium. C-11, C-12.) On March 22, 1999 the parties met with the lenders in Brussels and on the next day in Rotterdam reached nearly final agreement on the wording. C-75, p. 20.

F. InterComm Holdings, Gerard Le Febvre, and UPC

Even though KPN had asked Valvision to return to complete the negotiations and had agreed to the principal price and terms, in early March, CSFB and KPN also were starting up negotiations with another potential bidder, InterComm Holdings.

According to De Jong, Nicholas Mearing-Smith, whom De Jong had known previously and who in January 1999 had become the President of InterComm Holdings, contacted Mr. De Jong about submitting a bid for RCF. (DJ Tr. at 19-20.) De Jong knew Mearing-Smith as well as his investment banker Stephen Davidson of Bear Stearns. As De Jong testified, both were very experienced in telecommunications, and they were serious and substantial.

The discussions between CSFB and InterComm began prior to March 16, 1999 when Behar sent a confidentiality letter to Stephen Davidson, a banker at Bear Stearns, which was acting for InterComm. C-81.³⁵

Three days later on March 19, 1999, CSFB delivered the RCF Information Package to InterComm Holdings—the same day that CSFB was inviting Valvision to Europe to complete the final details of the negotiations.

InterComm Holdings was a cable operator in France and Trinidad and owned InterComm France. InterComm France had two operating subsidiaries: Cable Services de France and Sud Cable. R-17. The two companies together had approximately 29,000 subscribers. C-95.

InterComm had a seasoned management, was represented by Bear Stearns and had substantial assets available to purchase RCF. CSFB as an investment banker should have made sure that potential purchasers had the financial capability to complete a transaction. Although CSFB and KPN now claim that they did not consider InterComm to have the financial resources to buy

³⁴ It is possible that Valvision's opinion of Esgain may have been shared by the companies that Esgain may have approached to back a management buyout.

³⁵ See Letter dated April 19, 1999 from InterComm to CSFB (R-16, Confidentiality, Page 2).

RCF, it seems odd that they wasted time with InterComm in the first instance and did not contact UPC which had just raised €1.2 billion to acquire cable systems.

As discussed above, UPC, in February 1999 had just raised over €1.2 billion on the Dutch exchange to fund acquisitions. On March 29, 1999 UPC announced the acquisition of Time Warner's cable properties in France, which included Rhone Vision Cable.

In France, InterComm's primary manager was Gerard Le Febvre. Le Febvre through his company the Reflex Group, had an interest in Cable Services de France. R-17. Gerard Le Febvre was also the President of Rhone Vision Cable in which he held a 2.5% interest. Le Febvre was also a close associate of Patrick Drahi and Le Febvre worked with UPC in 1999. Further, Drahi acted as a consultant in 1998 and 1999 for InterComm. Gordon Affidavit, C-97. Gerard Le Febvre also was the President of InterComm's Cable Services of France.³⁶

The REFLEX Group:

The Reflex Group, created in 1992 by Gérard Le Febvre, has generated two cable operators: Rhône and Rhône Vision Câble (with Time Warner) and Câble Services de France. For both Rhône and Câble Services de France, Reflex has proven its ability to obtain solid financial backing, and to develop reliable and permanent projects with solid partners.

See Exhibit R-17.

Mr. Van der Hoeven who had spent years in managing KPN's French cable operations acted as if he had no knowledge at all of the players in the French cable industry. Mr. De Jong, whose firm was hired for this type of knowledge and expertise, similarly seemed to have no similar knowledge.

Mr. De Jong and Mr. Van der Hoeven's memories of the discussions between CSFB and InterComm were very hazy. On March 31, 1999, Behar received an urgent message to call Bear Stearns concerning the InterComm interest. So, Just two days after UPC announced its agreement to acquire Le Febvre's company Rhone Vision Cable, InterComm and Le Febvre were having urgent discussions with CSFB as to the acquisition of RCF.³⁷

³⁶ Claimant Valvision has filed group exhibit C-79 to show that on April 19 and 21, 1999, when Le Febvre for InterComm submitted its offer to KPN, Le Febvre was the President and shareholder of Rhone Vision Cable, a company that UPC had announced it would purchase on March 29, 1999. This, coupled with the fact that InterComm soon thereafter was purchased by UPC, suggests that Le Febvre, InterComm and UPC were collaborating in April-June 1999. These facts suggest that InterComm withdrew its bid in May, 1999 so as not to push up the price UPC would have to pay. The UPC acquisition of Rhone Vision was completed in August 1999.

UNITED PAN EUROPE COMMUNICATIONS NV, FORM 10-Q, For the quarter ended September 30, 1999

Acquisition of Time Warner Cable France

In August 1999, UPC acquired, through Mediareseaux, 100% of Time Warner Cable France, a company that controls and operates three cable television systems in the suburbs of Paris and Lyon and in the city of Limoges. The purchase price was USD 71.1 million (146.9 million). Simultaneously with the acquisition of Time Warner Cable France, UPC acquired an additional 47.62% interest of one of its operating systems, Rhone Vision Cable, in which Time Warner France had a 49.88% interest, for FFR 89.3 million (30.0 million), increasing UPC's ownership in this operating system to 97.5%. The acquisition was accounted for under purchase accounting. Effective September 1, 1999, UPC began consolidating its investment in Time Warner Cable France, including its debt, which was 100.8 million.

³⁷ Patrick Drahi, who was running UPC in France, had until the beginning of 1999 been working with InterComm as well as UPC. C-97, Gordon Affidavit. Le Febvre was working not only for InterComm and Rhone Vision, but also for UPC. Id.

On the morning of April 19, 1999³⁸ (the day that Valvision signed and returned the SPA to KPN), Nicholas Mearing-Smith of InterComm submitted a written indication of interest offering FFr 187 million (€28.5 million) for KPN's interest in RCF—InterComm's offer was €15.5 million MORE than the price in Valvision's contract. At this point on the morning of Monday, April 19, 1999, KPN had yet to receive the fax of Valvision's signature, and had yet of course to execute the SPA.³⁹

On Wednesday April 21, 1999 Le Febvre sent a letter directly to Patrick de Vos indicating the interest of InterComm in acquiring RCF, and enclosed background information about Cable Services de France.⁴⁰ Le Febvre refers to his telephone conversation that day with De Vos: "Je vous remercie de l'entretien téléphonique que nous avons eu ce matin concernant notre intérêt pour acquérir RCF" ("I would like to thank you for your telephone call this morning concerning our interest in acquiring RCF"). A fax stamp on this letter shows that the Le Febvre fax was forwarded by De Vos to Van der Hoeven (R-17). Apparently, this letter was then faxed by Mr. Wunderink to Ronnie Behar.

In his testimony, De Jong was having a hard time remembering anything else that went on, but did have a clear memory that he was "very annoyed" that InterComm was going around his back to KPN and the minority shareholders. DJ Tr. at 27.

The next day, April 22, 1999, Gerard Le Febvre had Nicholas Mearing Smith's secretary send a copy of the Letter of Intent to both Van der Hoeven and De Vos. (C-86). It appears then that Behar and Mearing-Smith had a telephone discussion in which Mearing-Smith waived InterComm's financing condition. For then, on April 22 Mearing-Smith sent a three-page letter to Behar saying "Many thanks for the opportunity to discuss our offer for RCF and some of the issues involved today." C-87.⁴¹

Mr. De Jong admitted to having been aware of the letters from InterComm. Although he did not seem to remember anything else, he remembered having been angry that InterComm was by-passing CSFB and communicating directly with KPN and the minority shareholders, and that he had words with Behar about this. But Mr. De Jong could not explain whether the last letter, dated April 23, 1999, had been answered in writing or otherwise, whether CSFB discussed the letter with anyone at KPN, or anything else.⁴² Mr. De Jong could not explain why on April 22 or April 23 1999 CSFB was having any kind of discussion with any other bidder for RCF.

Mr. Van der Hoeven grudgingly admitted to have been aware of the dealings between CSFB and InterComm: He knew prior to March 9, 1999 that InterComm was an interested party (VDH Tr. at 76), he knew when CSFB first sent out the package on March 19, 1999 (VDH Tr.

³⁸ See C-85 showing fax at 9:19 AM.

³⁹ The chronology of the execution of the SPA is described in further detail below.

⁴⁰ Le Febvre used Cable Services de France letterhead (Le Febvre also was President of Rhone Vision Cable which was under contract to be sold to UPC.)

⁴¹ The April 22 (23) letter from Mearing-Smith was not produced by KPN. It was produced by CSFB at the February 21, 2001 hearing in London. This is yet one more document that KPN concealed from the Tribunal.

⁴² KPN never produced Mearing-Smith letter that De Jong brought to the London hearing. Van der Hoeven never mentioned it in his testimony. It is not credible that neither Behar nor de Jong ever sent the letter or discussed it with Van der Hoeven or Wunderink.

77), and he knew prior to his signing the agreement that InterComm had made an offer (VDH Tr. at 77).⁴³

To fully understand the relationships and the events of April 1999, it is appropriate at this point in the recitation of facts to move forward out of the chronology, and then return in the next section to a chronological recitation.

Thus, by the end of May, 1999, UPC had negotiated a deal to purchase all of the RCF shares from Brussels and Gillam for a price far lower than the price offered by InterComm on April 19, 1999, but had not signed the deal

The relationship between UPC and InterComm Holdings became clearer when UPC acquired InterComm France. On August 10, 1999, only six weeks after UPC acquired RCF, UPC and InterComm entered into a significant transaction whereby UPC would offer its broadband internet service "chello" to InterComm's 65,000 homes in France according to a UPC press release quoting Gerard Le Febvre, who by then was CEO of InterComm. C-77, Page 6, 000898.

This prompted one telecommunications newsletter to predict on August 23, 1999:

"The agreement between InterComm France and UPC ... has fueled rumours that they may eventually merge."

C-77, P.10, 000902.

This prediction was confirmed, when, on December 22, 1999, UPC announced that it and InterComm Holding had reached a definitive agreement for the acquisition of InterComm France Holding S.A. at a price of €100 Million (C-95, p. 46) for 30,300 (C-95, p.12) existing subscribers. C-77, Page 12, 000904. This acquisition was completed in February 23, 2000. C-77, p. 14, 000906.

A few days later, Nicholas Mearing-Smith, who had submitted the bid for RCF on behalf of InterComm Holdings, was made Managing Director, France for UPC. He reported to Patrick Drahi, who was instrumental in putting KPN into RCF in 1995. C-77, P. 15, 000907.

This circumstantial evidence must be viewed together with the other remarkable coincidence, the memory lapses⁴⁴ and improbable testimony, the refusals to answer⁴⁵, missing document, and the other stonewalling by KPN and CSFB.

⁴³ In his witness statement, Van der Hoeven states that on April 21 after he signed the agreement, he got a telephone call from De Vos concerning the InterComm bid. But, in his testimony, he readily admitted that he knew all about InterComm and the bid prior to April 21. Moreover, he acknowledged that KPN made the determination not to pursue the bid, not CSFB.

⁴⁴

The CHAIRMAN: Do you recall at what time the first contact was established between your client and Mediareseaux?

Mr. STUMPHIUS: No, I do not know, that has to be, I don't know when it was done.

⁴⁵

Q. During the period of February and March are you aware of any efforts by Credit Suisse First Boston to obtain other buyers for this?

A. That's under my professional ethics.

Q. Your communications with Credit Suisse First

There is every indication that at some point in time InterComm was acting as a stalking horse for UPC. But, it seems clear enough that after its April 19, 1999 Letter of Intent (see R-16) InterComm bowed out in favor of UPC and then entered into other transactions and negotiations, which led ultimately to the acquisition of InterComm France by UPC.

G. Chronology of the Execution of the SPA

Procedural Order No. 3 asked the parties to provide a detailed chronology of the events surrounding the execution of the SPA in March and April. Because of the special interest in this issue, we will respond to this request, before reviewing the remainder of the evidence.

1. Concluding the Negotiations: March 19, 1999 to April 11, 1999

Valvision's representatives came to the meeting in Brussels and met with RCF's lenders on March 22, 1999. They then traveled to Rotterdam, and, at the offices of the Loeff firm, finished up the negotiations with KPN on March 23 and March 24, 1999. By March 25, 1999, another draft of the SPA had been prepared (C-75, P. 20), Valvision responded with final comments on April 2, 1999 (C-75, P. 24.) On April 8, 1999 KPN responded with its final positions (*id.*) On April 11, 1999, Valvision signified its approval to all the terms and asked that a final agreement for signature be prepared. (C-75, P. 26).

Without delay, on the next day, April 12, 1999, Van der Hoeven fired Esgain (See letter of April 14, 1999 to Esgain as part of Exhibit R-20.) Moineville was made the General Manager of RCF, and an article appeared in the French business journal La Tribune announcing Moineville's new appointment. (C-74).

Even if Van der Hoeven did not specifically advise Brussels and Gillam that Valvision and KPN in late March had indeed reached agreement on the deal previously described, the article in the La Tribune was a clear signal that the Valvision-KPN deal would be signed. And, of course, Esgain used to work with Gillam, so, of course they knew what was happening. Thus, by April 14, 2001, Brussels and Gillam knew that their time for decision would arrive soon, having been told the terms a month earlier.

2. Preparing the Documents and Execution of the SPA—April 15, 1999 to April 22, 1999

On April 15, 1999, KPN faxed an unexecuted copy of the final agreement to Valvision for execution. (C-75, p. 27). While KPN faxed all of the important exhibits, the entire package was

Boston and their efforts to obtain other buyers is something you cannot discuss?

A. Because it relates to my client's position, yes.

Q. But you could provide information concerning this conversation that you have in paragraph 3 when it's to your interest?

A. Yes, exactly, I think that's my role and my obligation, and also my right as a lawyer, to hold silent when I think that that is in my client's interest, or at least as the professional rules dictate me to do so.

not sent by courier to Valvision until April 16, 1999 (C-75, p. 28). Valvision was not willing to sign the agreement until the full package was in hand, and that did not occur until late on Monday, April 19, 1999.

Upon receipt of the full package of exhibits, on April 19, 1999, Valvision dated and executed the SPA and faxed the dated and executed copy of the agreement back to KPN. (C-75, p. 29, 30). On April 19, 1999 Valvision irrevocably committed itself to the purchase of the RCF shares⁴⁶ and such is the effective "date of the agreement."

On this same day, Monday, April 19, 1999, InterComm submitted a formal letter of intent to CSFB and offered a price nearly twice the price contained in the Valvision deal (R-16).

Respondent's witnesses were not willing or able to testify about any communications between CSFB and KPN on one hand and InterComm on the other during the period between March 19, 1999 and April 19, 1999. But, documents provided by CSFB on February 21, 2001 do prove that there were discussions between CSFB and InterComm during this period. C-84. No one would explain the curious coincidence of the InterComm submission on April 19, 1999.

After KPN received the SPA executed by Valvision on April 19, KPN then refused to sign and return agreement until Valvision first wired the Downpayment. (C-8). Valvision insisted upon receiving a fax of a fully executed SPA before wiring the funds.

In the midst of this, while KPN was dallying in returning the signed SPA, on Wednesday, April 21, 1999, Le Febvre of InterComm spoke to De Vos of Brussels on the telephone, and expressed an interest in acquiring RCF, and provided information about InterComm and Cable Services De France (C-17). De Vos faxed this letter to Van der Hoeven. These communications demonstrate that Brussels and Gillam were aware of the Valvision contract on April 21, 1999, if not earlier.

The next day, Thursday, April 22, 1999, InterComm Holdings submitted an offer to acquire RCF directly to Van der Hoeven and De Vos and apparently Behar had a discussion with Mr. Mearing-Smith of InterComm that led to another letter from InterComm on the evening of April 22, 1999. See Above.

Although Van der Hoeven claims he signed the agreement on April 21, 1999, there is no documentary evidence to support this claim. (C-6, 00116).

On Thursday, April 22, 1999, at 19:12, KPN faxed to Valvision the SPA signed by KPN. (C-75, p. 61.)⁴⁷ Again, everything suggests that the agreement was faxed after the discussion with Mr. Mearing-Smith that day.

By this time, on Thursday April 22, when Valvision received the faxed agreement, it was too late for Valvision to instruct its banks to wire that same day, so Valvision instructed its bank the next day, Friday, April 23, 1999, to wire the funds C-75, p.90.G

⁴⁶ Valvision never conceded that April 22, 1999 was the "date of the Agreement."

⁴⁷ KPN was then supposed to sign and return originals of the SPA to Valvision. But, remarkably, KPN never got around to providing to Valvision an original executed SPA to Valvision. When Valvision asked about this in early May, on May 19, 1999, Stumphius said this had not been done yet:

The original contract is currently in circulation for signatures, and will be sent to you as soon as possible.

C-12. Ordinarily, Valvision would have expected the originals weeks earlier. This suggest that KPN and Stumphius in late April were already aware the UPC would purchase the RCF shares.

Even though KPN could have sent the Notification as early as April 19, 1999, KPN waited until Thursday, April 29, 1999, to finally send the Notification of the Sale to the Minority Shareholders.

Under the SPA, the Notifications were to be sent "within three business days of the date of the Agreement."⁴⁸ The date of the agreement was April 19, 1999, and thus the Notification should have been by April 22, 1999.⁴⁹

Assuming the date of the Agreement was April 22, 1999, when KPN signed and returned the SPA to Valvision, and which KPN initially asserted was the "effective date" (R-2), then the Notification to the minority shareholder should have occurred on or prior to April 27, 1999.

But, the minority shareholder had actual notice of the execution of the SPA at least on April 21. On April 12 they knew that the deal was finalized, and even on March 9 had received a briefing on the terms of the Valvision deal.

Mr. Van der Hoeven acknowledged the importance of the time. In describing his May 19 lunch with De Vos, Van der Hoeven said:

[De Vos] told me that they were considering a deal something, but that he didn't want to tell me, and I did n't want to know by the way. But you know, I thought we were already trying to sell this company for two years, and he can't make a deal so quickly, so I never believed that he would really do it.

VDH Tr. at 90.

Mr. Van der Hoeven was fully aware, as would any businessperson be aware, that timing was a key issue. Yet, at every opportunity, Van der Hoeven shared advance inside information with the minority shareholders, and thereby substantially undermined Valvision's position and extended the effective Notification Period.

H. The 20 Day Preemption Period

Upon receipt of the notification of a sale to third party purchasers, under the General Agreement, the Minority Shareholders would have 20 Business Days to notify KPN of their intention to preempt. According to the General Agreement, failure to notify within the 20 days period would be a waiver of the right of preemption.

1. The Notification Date was April 29, 1999

The written Notification was sent April 29, 1999. Twenty Business Days thereafter was May 27, 1999. The minority shareholders delivered their preemption notices on May 31, 1999. According to the uncontested and clear words of the General Agreement, the notices were late and the minority shareholders waived all of their preemption rights under the General Agreement.

⁴⁸ A Business Day under the SPA "means any day on which the banks are open for business in Amsterdam, the Netherlands and New York, NY, USA" During the period April 15, 1999 through April 30, 1999, there were no bank holidays in either Amsterdam or NY.

⁴⁹ Brussels and Gillam agree with Claimant's view that the agreement was dated April 19, 1999—their June 7, 1999 agreement describes the agreement as "the share purchase agreement dated 19 April 1999 entered into between Vision Networks NV. and Valvision Telecommunications B.V." Ex. C-17, 00212, Paragraph C of the Whereas Clause.

The Notices to the Minority Shareholders are dated Thursday, April 29, 1999.⁵⁰ The General Agreement provides:

"Except as otherwise provided for in this Agreement, all notices under this Agreement shall be sent by registered mail, with acknowledgement of receipt, and shall be deemed sent on the date of receipt or on the date of mailing if preceded by transmission of the text of such notice by telex or fax."

On April 29, 1999, KPN faxed the Notification to the minority shareholders (R-3, R-4, R-5, R-29) as required by 4.3.1 (d) of the GA. The GA required that the notices include:

- d) If the Withdrawing Party is a Core Shareholder, it shall first notify the other Core Shareholders mentioning :
- the name and address of the third party purchaser;
 - the nature and number of Shares to be transferred;
 - the exact nature of the contemplated Transfer;
 - the price per Share and/or the main terms and conditions of the Transfer; and
 - an irrevocable commitment by the third party purchaser to purchase the Shares, confirming the terms and conditions of the Transfer.

The April 29, 1999 Notification fully complied with the requirements of 4.3.1 (d).

It is undisputed that the Notice was indeed faxed out on April 29, 1999 to the minority shareholders and that the Notification Date was April 29, 1999.

Brussels and Gillam in their appellate brief of September 1, 1999 state that KPN notified them by fax on April 29, 1999. C-51, p. 4, 00520 and 00536, Item 7. pp. 00532 and 00547.⁵¹

De Vos in the "Note au Comite d'Enteprise de RCF du 2 Juin 1999" stated that the notice was given April 29, 1999. C-64 (R-9).

Stumphius states that the Notification Date was April 29, 1999 in his letter of May 19. 1999.⁵²

⁵⁰ Although KPN has asserted repeatedly that it had produced all relevant documents, KPN failed to provide copies of delivery receipts and/or fax transmission cover sheets. Virtually every exhibit provided in this matter shows that it was faxed. The minority shareholders admitted the Notifications were faxed in the filings to the French court

⁵¹ See Page 3 of the Brussels and Gillam brief, C-51:

3. Par télécopie du 29 avril 1999, VISION NETWORKS a notifié à BRUSSELS SECURITIES et GILLAM, la convention de cession d'actions conclue avec VALVISION TELECOMMUNICATIONS.

⁵² Stumphius in his May 19, letter states:

"The Minority Shareholders have been notified on 29 April 1999 (as I indicated to you in my memorandum of the same date): we have not had any definitive reaction yet we would expect their reaction ultimately on 28 May, 1999 (i.e. 20 Business Days after the Notification Date)."

Gillard's May 5 letter acknowledges that the notice was received also by courier on Friday, April 30, 1999. (R-7).

KPN has produced no response to the May 4 and May 5 letter.⁵³

De Jong said he had no idea if there was a response to these letters. (DJ Tr. at 34.) even though Behar is shown as being copied on the letters.

Stumphius testified that he could not recollect if they were responded to.⁵⁴

The May 4 and May 5 letters were not referred to in De Vos' May 25, 1999 letter. C-63.

The May and May 5 letters are not mentioned in KPN's September 1, 1999 brief to the French appellate court.

Brussels and Gillam waited almost a week to send out their letters.

The letters show that Brussels and Gillam had manufactured issues. For example, De Vos says in the first paragraph of his May 4, 1999 letter that the Notification does not refer to the tag along right with an irrevocable commitment to purchase the Minority Shares. Yet the tag along commitment is clearly referenced in 3.3.3 of the SPA and De Vos did receive a copy of the SPA.

De Vos claims that the Notice was missing Schedule F. C-61. But, it is unlikely Schedule F was not provided in the Notification because it is one of the schedules in the SPA package that was being faxed around by KPN. C-6, 00147.⁵⁵ Even so, the conditions in Schedule Fare insubstantial. In no way could delay in receiving this schedule have prejudiced a shareholder considering preemption.

Gillard's letter of May 5, 1999 is similarly of no substance. He even complains about needing "to have a clearer idea of who the buyer is."

The May 4 and May 5 letters from Gillard and De Vos appear to be transparent attempts by the Minority Shareholders to extend the Preemption Period. Consistent with all the facts the Notification Date was no doubt April 29, 1999.

⁵³ KPN states in its R-1 Discovery Brief dated June 21, 2000 at page 5:

Regarding above mentioned point 4.d, Respondent hereby states that the letter dated May 25 of Mr De Vos of Groupe Bruxelles Lambert to Van Der Hoeven is the only letter exchanged between VISION and the Minority Shareholders.

We point out that KPN here was responding to the direct request by Valvision for KPN's responses to the May 4 and 5 letters.

⁵⁴ STUM Tr. at 54

⁵⁵ Despite the request referred to by KPN at R-1 Respondent's Discovery Brief, p. 5, KPN did not produce the attachments to the Notification Letters which state: "You will find enclosed a copy of the sale and purchase agreement, signed by Valvision Telecommunications B.V. and Vision Networks N.V." The fair assumption is that what SPA sent to De Vos was a photocopy of C-6, which DOES include Schedule F. KPN has represented to the Tribunal that "all" documents concerning communications to the Minority Shareholders had been produced." Neither did KPN produce fax and delivery records concerning the April 29, 1999 notice. This is one more example of KPN concealing material records.

2. The 20 Business Day Period Ended May 27, 1999—A Business Day is Any Day on Which Banks Are Open For Business in Paris France.”

The 20-Day Period ended on May 27, 1999, which without question 20 “Business Days” from the Notification Date of April 29, 1999. “Business day” is defined in the GA:

“Business Day: means any day on which banks are open for business in Paris France.”

General Agreement, Article 1, Definitions. (C-1).

Exhibit C-78 is a table showing the computation of days and the days on which banks are open in France. Banks are open on Saturdays in France (unless the Saturday is a holiday such as Labor Day (Saturday, May 1, 1999) or Victoire de 45 (May 8, 1999). The other bank holidays in May 1999 were Ascension Day on Thursday, May 13, 1999 and Lundi de Pentecôte on Monday, May 24, 1999. The 20th Business Day after the Notification Date was May 27, 1999.

It is a simple matter to start with April 29, 1999 and count forward to the end of the preemption period. Without any question, the period ended on May 27, 1999.

I. Late-April May 1999. Events Occurring During The 20 Business Day Preemption Period.

During May, 1999, KPN supposedly was waiting to see whether Brussels and Gillam would decide to preempt. But the sparse record shows the following occurred in May.

April 24/25, 1999. Moineville immediately fails to cooperate with Valvision in arranging meetings with the mayors in the cities where RCF held franchises. This non-cooperation continued through May, and the meetings in fact never took place. C-97.

May 19, 1999. Stumphius advised Valvision that the Notifications were sent on April 29, 1999, that the reaction of the minority shareholders was expected “on 28 May 1999”, and that if there was no preemption, then the sale to Valvision would take place within five business days of July 9, 1999. Any exercise of the preemptive right was due by midnight, May 27, 1999, so, basically, Stumphius was saying that not until the morning of May 28, 1999 would KPN know what action was taken by the minority shareholders. (C-12).

May 19, 1999. Van der Hoeven went to Paris for the RCF “L’Assemblée Générale Ordinaire.” He had lunch with De Vos and claims to have little if any discussion about plans to preempt. VDH Tr. at 90-91. This is, of course, not credible.

May 19, 1999. Stumphius acknowledged that KPN still had not signed the original SPA for return to Valvision—the parties on April 19 and 22 had agreed to rely upon facsimile signatures.

May, 1999. De Jong and Behar have a telephone conversation with De Vos concerning whether De Vos was going to preempt. DJ Tr. at 32. The fact that De Jong and Behar were talking directly to the minority shareholders was at odds with his other testimony where he said that all dealings with the minority shareholders were left to KPN and Loeff.

May, 1999. De Jong advised Valvision that the minority shareholders would preempt and, in essence, asked Valvision if it wished to get into a bidding battle with the other bidder. Valvision declined. DJ Tr. at 33.

With May 27, 1999 drawing near, on May 25, 1999, just days after their lunch in Paris, De Vos and Van der Hoeven held a telephone conversation in which they discussed the exercise of the preemptive right. C-63.

Van der Hoeven testified that he does not recall what he discussed with De Vos. The letter shows that De Vos was concerned about closing quickly because he wanted to start readying the legal documents. It would be unlikely if De Vos and Van der Hoeven did not discuss when the preemption notices were due and what would happen if Brussels and Gillam preempted.

We could suppose that De Vos was worried that if Brussels and Gillam preempted prior to getting a signed deal with UPC, then Brussels and Gillam could end up being the owner of 96% of RCF, which they clearly did not want. VDH Tr. at 91. We could also suppose that Van der Hoeven may have said, “Don’t worry, Patrick. We will have two birds in hand—a Belgian bird and an American bird. If you preempt and then UPC backs out on you, KPN will not hold you to the preemption. We will hold onto the other bird’s downpayment and just require our other bird in hand to close.” Whether this was said or not by Van der Hoeven, this is exactly how KPN later acted.

De Jong acknowledged that a “couple of days before” the preemption, he learned that UPC was to buy the shares from the minority shareholders. DJ Tr. at 36.

J. Minority Shareholder Deliver Preemption Notices On May 31, 1999

1. Notice Of Preemption Not Delivered In A Timely Manner

Preemption notices were delivered by Brussels and Gillam to KPN on May 31, 1999. C-13 and C-14. However, these notices were late by several days, as discussed above, having been due no later than May 27, 1999. The General Agreement is quite clear as to the consequences: if a party fails to provide the preemptive notices in the twenty-day period, “they will be deemed to have waived their preemptive right.” Article 4.3.2 a)(i).

Failure to provide timely notice of preemption is a very serious matter, not only under the General Agreement, but also under French law.

Proper timing in the exercise of the preemption right is a concern of French law. In Dictionnaire Joly, volume 5 of the Treatise on Corporate Law, it is stated that the compatibility of preemption rights with the principle of free transferability of shares requires three conditions to be met one of which being that the implementation of preemption must be limited in time (Volume 5 Pactes d’actionnaire paragraph n°58 page 17). Similarly, in paragraph n°60 entitled “Problem of the limit of the duration,” the Treatise says that the clause must indicate the period during which the preemption right may be exercised.

This points to the idea that under French law, time is of the essence as concerns preemption rights. If the beneficiary does not exercise the right during the time imparted, then he must lose the right. In the same line of thought, it can be implied from this general concern that the beneficiary may not unilaterally extend the period for exercising the preemption right.

Further, it is equitable under these circumstances to strictly enforce the Twenty-Day notice period.

First, the minority shareholders actually had many more than 20 days. They were well informed of the progress of the negotiation starting at least on March 9, 1999. Certainly by April 21,

1999, by virtue of the InterComm holdings offer, they became aware that Valvision had signed the agreement.

Similarly, the Notification Date (when KPN provided notice to the minority shareholders, was delayed by over a week beyond April 22, 1999, but during that time the minority shareholders were aware of the Valvision contract.

Third, Brussels and Gillam did not need any time to engage in due diligence of RCF, for, they were actively involved in the management of RCF, and, had no need to evaluate the value of RCF.

Fourth, these Minority Shareholders were well-funded and liquid. Should they have decided to preempt, paying for the RCF shares would not have been a problem. As Van der Hoeven said, "they have the money, because it's a big bank." (Van der Hoeven, VDH Tr. at 98.)

K. KPN Learns On June 1, 1999 that BRUSSELS-GILLAM had in substance assigned the preemptive right to UPC.

The Notices of Preemption are dated May 31, 1999. The very next day, De Vos faxed to Van der Hoeven the documents that De Vos would to present to the Comité d'Entreprise. C -64 (R-9). The next day, that meeting was held and the presentation was made by Moineville who seemed to exhibit a very detailed knowledge of the plans of UPC even though the minority shareholders had preempted only two days earlier. C-16.

The minority shareholders had, it is clear, not exercised the preemption right for their own benefit, but rather for the benefit and on behalf of UPC. The de facto beneficiary of the preemption right then was UPC, not the minority shareholders. This is evidenced, among other things, by the fact that the two closings have taken place simultaneously. In addition, the June 7, 1999 Agreement between the minority shareholders and Mediareseaux- UPC (C-17) was tantamount to an assignment of the preemption right. At the June 2, 1999, RCF Comité d'Entreprise Meeting at which the transaction was described as a sale directly from KPN to UPC, De Vos proposed that no mention be made of the intermediate flip purchase by the minority shareholders. C-16.⁵⁶

Under French law, a preemption right in respect of shares in a company can only be granted to and exercised by a shareholder. The fact that the preemption right was on its face used by minority shareholders only as a device to allow a non-shareholder, UPC, to preempt the shares from Valvision constitutes an abuse of the right of preemption and amounts de facto to an exercise of the preemption right by UPC. The fact that the preemption right was not exercised by a shareholder is sufficient to characterize the impropriety of the exercise of the preemption right and it does not matter that the right was exercised within or without the periods prescribed by the GA.⁵⁷

⁵⁶ Van der Hoeven acknowledged that Moineville, who made the presentation, was under the control and supervision of VDH. Tr. At 93-94 and Stumphius admitted that conversations between his firm and Moineville would be privileged. Yet, KPN has not turned over any documents it had in its possession that related to communications between Moineville and UPC, Drahi, the minority shareholders, etc.

⁵⁷ For example, see Cour de Cassation Cass.civ. 1°, 19 novembre 1958 Office de Publicité du Petit Parisien c/ consorts Dupuy wherein it was ruled that a preemption right is a right attaching to the position of being a shareholder and is not separable from the possession of such position ("que la veuve Paul Dupuy avait disposé d'un droit de préemption, lié à la qualité d'actionnaire, et inséparable de cette qualité."). Also see Ph. Malaurie and L. Aynes Special contracts Cujas 13° ed , No 154 and Cour de Cassation Cass. com, 27 juin 1989 Barilla c/ Rivoire et Carret-Lustucru et autres .

Not only does French law look with disfavor on such assignment, but also the GA prohibits any assignments of the preemptive right except to as persons in the group. The GA agreement in Article 15 is quite specific in this regard.

The rights and obligations of each Party arising from this Agreement may not be assigned by either Party to a third party without the prior written consent of the other non-assigning Parties; provided, however that each Party may assign its rights and obligations under this Agreement to a person of its Group as a result of a Transfer of Shares as long as the assignee accepts in writing all of the rights and obligations of this Agreement and the Party concerned remains itself liable for the performance of this Agreement by the assignee.

KPN was perfectly aware at least on June 1, 1999 that Brussels and Gillam had in substance assigned the preferential right to UPC. R-9. Indeed, De Vos sent a fax to KPN telling them this. Not only were they factually aware of this but also when KPN and Brussels and Gillam entered into the June 17-18, 1999 Agreement, they made specific reference to the proposed transaction with the "Third-Party Purchaser," i.e., UPC. KPN in authorizing an assignment of the preferential right breached its obligations to Valvision under the SPA. It is also important that UPC waited until June 17, 1999 to issue its press release, indicating not only that it had doubts about whether Brussels and Gillam still had the right to acquire the shares, but also indicated the fundamental fact that what was involved was an assignment of the preemptive right.

L. Brussels And Gillam Fail To Make The Downpayment Required in the SPA.

The SPA requires clearly that "At the date of the Agreement, Purchaser will provide an earnest money deposit of NLG 3,940,000 ... the 'Downpayment'" (C -6, 00092, SPA Section 3.2.) At the date of Agreement would mean simultaneously or nearly simultaneously with the exercise of preemption. Thus, the Minority Shareholder should have immediately on May 31, 1999, initiated the deposit of the down payment. This they did not do and in fact they never paid.

Under the General Agreement, the preempting shareholders would be required to perform the conditions of the SPA including payment of the downpayment.⁵⁸ Even absent such a requirement in the GA, French law would require the preempting shareholder make the down payment specified in the SPA.

As discussed below, the making of the downpayment was a substantial condition of the SPA. Yet, KPN did not require that Brussels and Gillam make the downpayment. After Brussels and Gillam were in default of this requirement for 17 days, and at a time when KPN could have considered Brussels and Gillam to be in default for this reason alone, KPN entered into the secret agreement waiving this requirement.

⁵⁸ Brussels and Gillam were well aware that they were required to comply with the terms and conditions of the June 19, Agreement. In their contract with Mediareseaux (UPC) on June 7, 1999, Brussels and Gillam stated that they first would be purchasing 3,664,469 shares from KPN "pursuant to the terms and conditions of the share purchase agreement dated 19 April, 1999 entered into between Vision Networks N.V. and Valvision Telecommunications B.V." (C-17, 00212).

KPN's excuse was that Brussels and Gillam were a "bank" and that KPN did not need their downpayment. But, on June 17 KPN actually took a different position: KPN "waived" the requirement to make the downpayment but ONLY IF Brussels and Gillam guaranteed the purchase price AND agreed to close within 30 days. This poses an interesting question: had Brussels and Gillam refused to make this commitment, could KPN then have called a default under the GA and terminated the preemptive right?

M. The Requirement In The General Agreement To Close Within Ten Days.

The General Agreement required that "that the sale and payment of the purchase price shall take place within (10) Business Days following the exercise of the preemption right." GA, Section 4.3.3. (b). C-1, 00012. The exercise of preemption, untimely as it was, took place on May 31, 1999.

The end of the ten-day period starting May 31, 1999 (including Saturdays as Business Days) was June 11, 1999.

It is not disputed that Brussels and Gillam completely failed to close within this ten-day period—indeed, it appears that for KPN and Brussels and Gillam, Section 4.4.4. (b) was an inconvenient provision, so they chose to ignore the provision in its entirety.

Under French law, preemption rights should be construed strictly in all respects, including timing. If KPN had been acting in good faith with a genuine concern for Valvision's rights, it should have told the minority shareholders at the end of the 10-day period that they had failed to properly exercise their preemption right. Then KPN would have proceeded to complete the transaction with Valvision under the SPA.

N. Valvision Demands Return of Downpayment

In June 1999, it appears that KPN had concluded that two birds in the hand were better than one bird, so KPN was not pressuring Brussels and Gillam to comply with the General Agreement and the SPA. KPN felt that it could at the same time contend that preemption had occurred if Brussels and Gillam closed, but at the same time contend preemption had not occurred if Brussels and Gillam failed to close.

With Friday June 11, 1999, having come and gone, Valvision, on the following Monday, June 14, 1999, asked for the return of its downpayment. C-19. When, Valvision wrote to ask for the return of its down payment, it assumed that by that time the sale of the RCF shares to the minority shareholders had been completed, for that is what the GA required.⁵⁹

The next day, on the 15th of June, Valvision sensed that KPN was not acting in good faith and possibly was breaching the SPA. So, Valvision wrote a letter stating:

⁵⁹ At this time, Valvision lacked many documents and did not even have copies of the April 29, 1999 Notifications sent to the Minority Shareholders(another curious lapse by a most efficient law firm.) Valvision did not then know that the Notifications had been faxed. But, Valvision did have the May 31, 1999 notices of preemption, and, thereby assumed that the sale had been completed at least by June 11, 1999, as clearly understood by all the parties and as stipulated in the agreements.

We expect that your client's obligations to use its best efforts to deliver the French Shares to my client would require that your client not provide any extensions or waivers to the minority shareholders under your client's contract with them.

By the time it received the June 15, 1999 letter, KPN had already waived compliance with the 20-day period, the ten-day closing period, and the downpayment, and, so they needed to cover this up with some type of explanation.⁶⁰ At that point, they should have declared Brussels and Gillam to have waived their preemptive right. Rather, they entered into the June 17, 1999 side letter (the orphan side letter that no one will take responsibility for: not Loeff, not KPN, not CSFB) whereby this substantial condition was waived.⁶¹

The Parties agree to complete as quickly as possible. However, the Completion shall at the latest take place on June 30, 1999. The Purchaser hereby guarantees to the Seller, the payment of the purchase price, as per 3 above to the Seller before or at the latest on June 30, 1999. Provided that the Purchaser shall comply with the aforesaid obligation, the Seller shall waive its rights with respect to the requirement for the Purchaser to make an earnest money deposit referred to in Article 3.2;

And, in response to Valvision's June 15 letter, KPN responded, that not only had the sale not occurred—Mr. Booyesen, KPN's counsel, wrote on June 17, 1999, that;

"Article 3.3.2 seems to me unequivocal in stating that the obligation to repay the escrow amount only arises after the shares are actually transferred to and paid for by the pre-emptor." C-21.

Mr. Stumphius was even clearer—in his letter of June 23, 1999, KPN took the position that the SPA would remain in full force and effect "if for any reasons the sale to the minority shareholders would not be consummated." C-26. KPN by its acts took the position that preemption only occurred "upon completion of the sale of the French shares to the minority shareholders." Mr. Stumphius wrote in his letter of June 23, 1999, C-26:

"According to the SPA among Vision Networks and Valvision, the Downpayment is only returnable once the minorities have completed the pre-emption of the shares (i.e. transfer of the shares and payment therefor (article 3.3.2)). The contract does not provide, notably, for repayment of the Downpayment prior to completion of that sale. This is logical as the SPA continues to be in force and effect until completion of the sale to the minority shareholders..."

⁶⁰ Also, as of June 15, 1999, UPC, perhaps aware of the weakness in the position of Brussels and Gillam had yet to issue a press release concerning the acquisition of RCF.

⁶¹ Van der Hoeven testified that KPN's "lawyers" drafted the secret letter agreement. In the French litigation, KPN and Brussels and Gillam colluded to conceal the existence of this agreement to the French courts, thereby creating a fraud on the courts. In the two lower court proceedings and the three appeals, these parties filed multiple documents with the courts. In this arbitration, the secret letter agreement was not disclosed by Respondents with the first documents provided by KPN in January, 2000 and is NOT mentioned in the Terms of Reference. Respondents produced this letter in the arbitration on June 21, 2000, one year after it was signed. See Respondent's Submission No. 1, June 21, 2000, Page 6. Respondent in its January 18, 2000 summary of facts on page 2 discussed the June 17-18 agreement, but did not disclose the existence for the secret side letter . This secret letter was produced long AFTER Valvision filed its appeal brief with the Cour de Cassation on November 29, 1999.

Valvision now knew that it had been suckered into being a standby purchaser.

Valvision responded with a further demand and stated that "if we do not receive and immediate ratification by [KPN] of the [KPN's] obligation to sell the shares to us, we will consider the contract to have been breached and will pursue additional action." (C-21).

That same day, UPC (acting as if it was sitting just outside, if not inside the negotiating room) issued a press release announcing that it was acquiring RCF and it was confirmed that the minority shareholders were flipping the shares to UPC. C-77, p. 1 This same press release referred also to the acquisition of Le Febvre's company, Rhone Vision Cable.) Is it a coincidence that UPC waited for the secret agreement to be signed to announce its RCF deal?⁶²

KPN was bound to observe the limitations on its right to acquire the shares resulting from the GA as it existed at the time of the execution of the SPA. Any subsequent modification of the GA approved by KPN without the knowledge or consent of Valvision is in fact a unilateral modification of a condition of the SPA itself and is thus not enforceable against Valvision.

Under French law, and more specifically Article 1165 of the Civil Code (French), parties to a contract cannot prejudice third parties. By agreeing to modifications of the GA after the execution of the SPA, KPN and the minority shareholders should not, but did, prejudice the rights which Valvision held against KPN under the SPA. Moreover, the minority shareholder preempted subject to the terms of both the SPA and the GA. KPN, by allowing nonetheless these effects to take effect against Valvision, and thus to rob Valvision of the benefit of the SPA, breached its obligations to Valvision under the SPA and is liable for damages to Valvision for its breach.

O. Transfer of Shares to UPC

On June 29, 1999, Brussels and Gillam paid for the shares and entered into what Valvision claims was a sham two part closing whereby the shares were transferred to the Brussels and Gillam, who then retransferred the shares to UPC, in violation of a then valid court ordered seizure obtained by Valvision from the French courts. Ultimately, this seizure and a second seizure were overturned by the first level appellate court, and the second decision is now on appeal before the Cour de Cassation. This litigation is not relevant to the substance of the Arbitration, but it should be emphasized that material information was knowingly concealed by KPN from the French courts.

V. REVIEW OF THE WITNESS HEARING TESTIMONY

It is useful to take another look at the testimony of De Jong, Stumphius, and Van der Hoeven in view of the summary of facts above.

When De Jong finally testified it was revealed that CSFB was still under retainer by KPN, suggesting that KPN decided not to give CSFB the choice of either testifying or being discharged by KPN. De Jong's testimony evidenced familiarity with prior testimony and documents filed herein

⁶² Van der Hoeven, Stumphius, and De Jong all deny having advised Brussels or Gillam of the notice of breach sent by Valvision to KPN. If true, then this means that KPN also violated its agreement with Brussels and Gillam. More likely, Brussels and Gillam as well as UPC were perfectly aware of what was going on, and that was on reason they needed the secret letter agreement.

(“the bird in the hand.⁶³”) But, De Jong did not remember or was not told everything in Van der Hoeven’s testimony. De Jong’s testimony showed that Wunderink was another essential witness who was being hidden from the tribunal.

Mr. Van der Hoeven testified that he had primary responsibility for KPN in the transaction and did not indicate that he consulted with anyone else at KPN or Vision. He testified that he was primarily responsible for the relationship with Credit Suisse First Boston. Mr. Van der Hoeven testified generally that Credit Suisse First Boston and the Loeff firm handled all the negotiations and also negotiated with the minority shareholders.

When Mr. De Jong testified, he said that the primary contact and decision maker at KPN was not Mr. Van der Hoeven, but was Mr. Wunderink. De Jong testified:

Q. Were you communicating with Mr. Van der Hoeven about what was going on in the meeting?

A. We may, but the main principal on the KPN side was Hettion Wunderink.

Q. Mr. Wunderink was the main principal?

A. Yes. He was in their M&A department and he used to be the CFO of Vision Networks. Weiner Van der Hoeven was the general manager of Vision Networks. We talked to him, usually to get data out, but not necessarily to discuss the process, because that was Hettion’s....

Q. So your primary contact at KPN was with Mr. Wunderink?

A. Correct.

Q. How do you spell it?

A. W-u-n-d-e-r-i-n-k.

Q- Was he involved with this from the beginning in 1997?

A. Yes. At the outset of the process he was the CFO of Vision Networks and then once the two big pieces had been sold he moved to KPN and became active in their M&A department.

Q- Was he actively looking for candidates with you?

A. He left it largely to us. He was sort of the liaison person and the one that oversaw the process from the KPN side.

DJ at 12-13.

Van der Hoeven left a completely different impression as to the responsibility of Wunderink:

21 Q. Between yourself and Mr. Wunderink who is
22 superior to the other, does he report to you, do you
23 report to him?
24 A. As far as Vision Networks is concerned he is
25 reporting to me.

VDH at 71

14 Q. I have no further questions; excuse me, I
15 have one other question. Concerning First Boston, are you
16 the primary contact with First Boston?
17 A. The primary contact?
18 Q. With Credit Suisse First Boston, I am just
19 trying to see is there someone above you who has
20 responsibility for the relationship with Credit Suisse
21 First Boston?
22 A. Nobody above me, no.

VDH at 107

⁶³ Compare Van der Hoeven: “So we simply said okay, this is a bird in the air, and we accepted the bird in the hand.” VDH at 80 to De Jong: “One bird in the hand was better than ten in the air”. DJ at 26.

Van der Hoeven testified that although he monitored Mr. Behar, Mr. Behar did most of the negotiations. He denied any dealings between CSFB and the minority shareholders in May and June 1999, and said that CSFB did not provide information to the minority shareholders as suggested in the notices to the minority shareholders.

It is clear that KPN had maneuvered the Tribunal to not hear Wunderink's testimony--after Valvision asked for the testimony of Van der Hoeven and Wunderink, KPN offered up Van der Hoeven, hoping that the Tribunal would never discover that Wunderink was in charge. Then Van der Hoeven lied about Wunderink's role so that Wunderink would not have to testify. VDH Tr. at 71-72. DJ Tr. At 12-13.

When Mr. Stumphius testified, he declined to testify as to any of his discussions with either CSFB and the manager of RCF because of attorney-client privilege as well as a privilege that his testimony would hurt his client. Mr. Stumphius also said that he personally was not involved in the negotiations with the minority shareholders and that that was handled by KPN and by his associate Mr. Boysen. Mr. Stumphius had no knowledge about who drafted the June 17, 1999 side letter⁶⁴ (Mr. Van der Hoeven, on the other hand said that the lawyers drafted it. VDH at 98-99.)

Mr. Stumphius did suggest that there were efforts made to find other bidders in January and February of 1999 but declined to discuss which efforts and said that those efforts were made by CSFB. But, when Mr. De Jong of CSFB testified, he stated, unbelievably, that no efforts were made to obtain other bidders in January and February of 1999 after negotiations broke down between Valvision and KPN.

Mr. De Jong said that there had been no communications with UPC to purchase RCF notwithstanding that it was public knowledge that UPC had raised over a billion dollars for the purpose of acquisitions in February, 1999. Mr. De Jong seemed not to be aware that CSFB was raising debt for UPC to also engage in acquisitions. Mr. De Jong was aware that UPC was buying Time Warner's French cable operations, but, still did not see the utility of offering RCF to UPC.

Finally, Mr. De Jong's testimony appeared to be based more on adjusting his story to the documents previously submitted to the Tribunal, than providing fact based testimony. Indeed, he admitted to providing hypothetical testimony as if it were actual fact. De Jong's position seemed to be "as long as CSFB was not involved, there was no reason for us to follow that too closely." DJ Tr. at 40.

Summarizing the testimony of the hearings, the KPN witnesses (including De Jong) showed remarkable memory lapses especially in regard to the period of May and June 1999. As a group, it can certainly be said that were one to believe their testimony, this was a remarkably passive and incompetent group. CSFB, one of the leading investment bankers in the world, was stumbling around in the dark. KPN similarly acted as if had not a clue about the real world and knew nothing at all about the cable industry and the people involved.

⁶⁴ This is all Stumphius could recollect on the side letter (STUM Tr. at 33):

Q. There was a second agreement dated June 17th, it's a letter agreement, are you aware of that particular agreement?

A. Yes.

Q. Were you involved in the negotiation of that agreement?

A. That's Mr. Boysen again.

Q. Do you recall, do you know who drafted that letter, was it drafted by Brussels Gillam or by your firm?

A. I don't recall.

All of these negotiations occurred in June of 1999, but according to the witnesses, anomalies like the secret agreement were purely spontaneous, and no one remembers anything at all about the secret agreement, except that it is there.⁶⁵ We are told, no decisions were made by KPN and the lawyers were not even there if you believe the lawyers. Stumphius disappears on holiday, and does not ask what went on when he returned. CSFB was totally unconcerned as to what was going on as long as it did no wrong. Then there is the charade that KPN could risk damages of tens of millions and had no power to cause Behar to show up and testify. Behar did not testify for one reason: his testimony would hurt KPN. Similarly, the testimony of Booyens would hurt KPN and the testimony of Wunderink would hurt KPN.

VI. LEGAL ANALYSIS

This Sale and Purchase Agreement is subject to Dutch Law. The GA is subject to French Law. This Arbitration, by its terms, is to be determined by the "Rules of Law."

A. Rules for Interpretation of the Agreements

The principles of construction of contracts and the obligations are similar under Dutch and French law and are similar to the European Principles of Contract Law. Because of this similarity, for this submission we will refer to the European Principles because they have synthesized the law applicable to the contracts in question.

CHAPTER 5 : INTERPRETATION

Article 5:101 (Ex art. 7.101/ 101A): General Rules of Interpretation

- (1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.
- (2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.
- (3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 5:102 (ex art. 7.102): Relevant Circumstances

In interpreting the contract, regard shall be had, in particular, to:

- (a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the nature and purpose of the contract;
- (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves;
- (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received ;
- (f) usages; and
- (g) good faith and fair dealing

⁶⁵ De Jong's memory lapses were extraordinary: DJ Tr. 37-39

Article 5:103 (ex art. 7:103): Contra Proferentem Rule

Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.

Article 5:104 (ex art. 7:104): Preference to Negotiated Terms

Terms which have been individually negotiated take preference over those which are not.

Article 5:105 (ex art. 7:105): Reference to Contract as a Whole

Terms are interpreted in the light of the whole contract in which they appear.

Article 5:106 (ex art. 7:106): Terms to Be Given (Full) Effect

An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not.

Dutch law provides for equity as a tool for interpretation of a contract.⁶⁶

B. The Right of Preemption Under French Law

The General Agreement, which here establishes the preemptive right, is subject to French Law. Under French Law, preemptive rights are to be interpreted narrowly. Because of the nature of the preemptive right, the preemptor must comply with the terms of the agreement providing the right. Upon preemption, he must follow the same terms and condition of the contract that he has preempted.

The preemptive right provides the beneficiary with a simple preferential right, a purchase priority 9v. not. P. Voirin, JCP, 1954 I 1192; M. Dragot, *Le pacte de préférence*, Litec, 1988). Therefore, Professors F. Terré, Ph. Simler and Y. Lequette state that it involves a “*contract pursuant to which a person makes a commitment to another person, who agrees, not to enter into a specific contract with a third party, without having offered to enter into the contract with the person, under the same conditions*” (*Obligations*, Dalloz, No. 187; similarly, Ph. Delebecque and F. Collart-Dutilleul, *Contrat civils et commerciaux*, Dalloz, 2e ed., No. 70). The preemptive right effectively places the preemptor in the very position of the chosen transferee: the preemptor must, therefore, observe all the conditions of the contract anticipated by the transferor and the chosen transferee. It is a preferential right under the same conditions.

If the holder of the preemptive right “decides to preempt, he replaces the buyer, as if the contract were transferred: he holds the same rights, he is subject to the same obligations, and finds himself under the same conditions” (Ph. Malaurie and L. Aynès, *Special Contracts*, ed. Cujas, 13 ed. No. 154). In other words, the preemptive right “is a simple preferential right necessitating the observance of conditions of the planned transfer” (J. Derruppé, Rep. Dalloz Sociétés, see Preemption No. 50). The exercise of a preemptive right does not necessarily require the drafting of a new instrument, but results in the substitution of a person (the preemptor/beneficiary) for another (the chosen transferee) (see again, in addition to the authors cited above, Ph. Malaurie and L. Aynès, op. cit, No. 794). And the Court of Appeals was able to qualify the preemption agreement

⁶⁶ See case law starting with Dutch Supreme Court (Hoge Raad) decision of 13 March, 1981, Nederlandse Jurisprudentie (NJ; Dutch Case Law Report) 1981 No. 635 (Haviltex-decision): what parties have agreed to is not only what is expressly provided for in the agreement (the wording), but is also incorporated in the ‘implied terms’: what may parties under the given circumstances reasonably derive from what has been agreed to and expect to be provided for in the contract.

and a conditional unilateral agreement (Cass. civ. 3e, March 16, 1994, D 1994. 486, Fournier report; Rep Defrénois, 1994.1164, L. Aynès). It must, therefore, be assumed that the conditions of the proposed transfer must be satisfied by the preemptive candidates. As a result, the preemption may only be carried out under the terms and conditions of the proposed transfer, unless otherwise stipulated in the preemption agreement.

Thus, French law would require that the 20-day preemption period be complied with on a strict basis. Further, should there be a preemption, the preempting shareholders are to comply with the SPA including the requirement to close in 10 days and to make a downpayment.

C. The 20-day Preemption Period

The burden is on KPN to establish that the minority shareholders must have regularly and properly provided the notice within the 20-day period. If the minority shareholder did not provide the notice as required, then KPN was obligated to proceed with its sale to Valvision. There is no question whatever as to this proposition.

In determining whether the minority shareholders complied with the 20-day preemption period requirement, there are two issues: When did the preemption period commence and how are the days counted.

1. Commencement Date of the Preemption Period

On April 29, 1999 Valvision delivered the Notification to the minority shareholders by fax with a copy by messenger. This has been covered at depth in the chronology above, but, we emphasize that in the French litigation, the minority shareholder, without equivocation, acknowledged this fact.

The date of the SPA was April 19, 1999 as discussed above, and the SPA required that the Notification be given within three days of the notice. Nothing would have prevented KPN from sending out the Notification as early as April 22, 1999 when KPN signed and returned the contract. The failure of KPN to immediately give this notice is an early indication that something was awry, especially since KPN's counsel had been so efficient previously. When the minority shareholder received the Notification on April 29 they were perfectly aware that KPN has been delinquent in providing the Notification.

KPN intentionally delayed giving the formal notice to the minority shareholders. So, how can KPN explain why it still could not get the notice out until April 29, 1999.

Based on the circumstance, the only explanation in the delay of the sending of the Notification is collusion amongst KPN, Brussels, and Gillam.

Moreover, when the minority shareholder received the official Notification on April 29, they already knew what was going on.

Because KPN and the RCF minority shareholders fraudulently acted together, to the detriment of Valvision, so that the preemptive right could be exercised under irregular conditions. These companies, in fact, seem not to have observed the requirement of execution in good faith of the agreements (Art. 1134, paragraph 3 C. civ.) the importance of which is known in the doctrine and current case law. Y. Picod, *Le devoir de loyauté dans lexécution du contrat*, LGDJ, 1989; "L'obligation de cooperation dans l'exécution du contrat," *JCP* 1988 I 3318; F. Terré, Ph. Simler and Y. Lequette, *Les obligations*, Dalloz, 6e ed., 1996, No 414 et seq; Ph. Malaurie and L.

Aynès, *Les obligations*, Cujas, No. 622 et seq; J. Mestre, *RTD civ.* 1992.760, 1992.354, 1994.100, 346.)

While the 20-day decision period may have started running formally on the 29th of April, the minority shareholders were in fact given by KPN many more than a 20-day Notification period as a result of collusive maneuvers between KPN and the minority shareholders.

Because of the collusion involved, it is appropriate that the Notification period be deemed to have commenced on the date it is clear there was actual notice, April 21. It is both reasonable and equitable to enforce strictly the preemption period, even were strict enforcement not already required by French law and the express stipulation of the General Agreement. KPN delayed giving the written notification although aware that the minority shareholder already had actual notice; and the minority shareholder were aware that KPN was delaying the giving of Notification.

2. Computation Of The 20-Day Preemption Period

As discussed above, the Notification was given on April 29, 1999, but Brussels and Gillam had actual notice prior to April 29. However, even taking the April 29 date as the Notification Date, Brussels and Gillam's notice of May 31, 1999 was NOT timely.

The definition of Business Day in the General Agreement is clear: "any day on which banks are open for business in Paris." The conditions of the preemptive right, under French law, are to be narrowly construed and strictly followed. The definition of Business Day in the General Agreement is explicit and unambiguous. Further, it is a well-known fact that banks in Paris are open on Saturday.

The twentieth Business Day after April 29, 1999 is May 27, 1999, and not May 31, 1999, for the plain reason that banks in Paris were indeed open on Saturday, May 15, 1999 and Saturday, May 22, 1999. Exhibit C-92 is a "Schedule of April and May 1999 Business Days As Defined in the General Agreement." Exhibit C-91 includes Calendars from this period.

Even Mr. Stumphius in his letter of May 19, 1999, stated that "We would expect their reaction ultimately on 28 May 1999 (i.e. 20 Business Days After the Notification Date)." C-12. Stumphius was well aware of this fact when he carefully computed the preemption period. He knew that one minute after midnight on May 28, 1999, everyone would know whether Brussels and Gillam would preempt.

D. The Requirement To Complete The Sale Within Ten Days

The General Agreement provides that:

"the sale resulting from the exercise of the preemptive right and the payment of the purchase price shall take place within (10) Business Days following the exercise of such right"

KPN makes two arguments as to why the 10-day period did not apply. First KPN argues that the Purchaser under the SPA had 55 days from the Notification Date to close the transaction. So KPN argues that similarly, a preempting shareholder would have 55 days to close.⁶⁷ KPN argues that the 10-day period is superseded. There is no support for this position.

⁶⁷ The 55 Business Day period is computed in the SPA as follows:

KPN then argues that even were the 10-day requirement applicable, it was not an imperative and essential condition to the contract, violation of which would result in the waiver of their preemptive right. This interpretation is not correct: it ignores the mandatory language in the SPA as it applies to the 10-day period, and gives no effect to the provisions in the SPA, an agreement that the preempting shareholders assumed once they elected to preempt.

KPN and the minority shareholders were certainly aware of this requirement—which is why they entered into the secret agreement of June 17, 1999, which in substance waived the requirement of the minority shareholders to close within the ten-day period.

1. The 55 Day Period in the SPA Does Not Supersede the 10-Day period in the General Agreement

Considering the first argument of the Respondent, the General Agreement and the SPA Agreement must be read together as a whole. These are interrelated agreements which are to be considered together. Respondent may not just pick and choose as to which provisions it wishes to recognize.

The General Agreement requires that the preemption sale "must" be concluded within ten days of the notification of preemption. KPN tailored the SPA closing periods to the requirements of the General Agreement:

The 55-day period was chosen by KPN to match the 20 day Notification Period in the General Agreement and the ten-day closing period. This is clear from Stumphius's letter of December 11, 1988. C-4.⁶⁸ Should the minority shareholder preempt, they had 30 days (20 plus 10) after the Notification Date to close. Should the minority shareholders preempt but not close in a timely manner, Valvision would have had 25 days after the date that a preempting shareholder would have been required to close.

The SPA provided that the escrow agent would retain the downpayment made by Valvision until the RCF shares had been transferred to the minority shareholders and the minority shareholder had paid for the shares.

"[S]hould the Minority Shareholders exercise their Minority Rights ((such that any or all French Shares are sold and transferred to, and paid for by, the Minority Shareholders or any one of them...))" Clearly the SPA contemplated a strict enforcement of the ten-day period, or this would be a commercially ludicrous clause. If one accepts KPN position, then that would have meant that Valvision's downpayment could have remained in escrow for 3 months after the exercise of the right of preemption. When the

Article 3.3.4 requires the closing to occur within five days of the end of the Period.

"Period" is defined in Schedule D, Schedule of Defined Terms, to 50 Business Days following the Notification Date.

⁶⁸ The 55-day period was intended to provide the buyer with a very brief period to close after it was determined whether the minority shareholder had preempted. Had the preemption period been longer than 20+10 days, then the closing period under the SPA would have been a longer period as well. Indeed, in December, 1998, KPN was struggling with determining the proper length of time for the "Period" under the SPA. See Letter from KPN dated December 11, 1998 (C-4) wherein they proposed extending the 50-day period to 70 days, a suggestion not ultimately applied.

minority shareholder preempted, they preempted subject to the SPA. Thus, when the minority shareholder failed to close, KPN was obligated to sell the shares to Valvision.

KPN's position that the same period allowed to Valvision to close under the SPA would also be provided to the preempting shareholder also is not consistent with the explicit provisions of the General Agreement. The General Agreement explicitly recognizes that the Third Party Agreement would have a longer time period than would be allowed to the preempting shareholder. The General Agreement provides that, should the preemptive right not be exercised, then the transfer of the shares to the Third Party must occur within three months after the end of the Preemption Period.

"4.3.2 b) Preemptive Right

In the absence of exercise of the preemptive right, the Withdrawing Party may Transfer his Shares to the third party purchaser in the terms and conditions mentioned in the notification provided for in 4.3.1.d) above and only in such terms and conditions and within three (3) months after expiration of the time period given to the other Parties to exercise the preemptive rights."

C-1, Page 12.

This provision is meaningful only if positive effect is given to the requirement that the preempting shareholder close in the ten day period. There is no question that under the General Agreement, it would have been proper were the SPA to have specifically provided three months to Valvision to close—then, the absurdity of the KPN approach becomes even clearer. Following KPN's logic, the third party shareholders could have closed even six months later, all the while holding on to the downpayment of Valvision.

One of the rules of interpretation is that:

"If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party."⁶⁹

Finally, KPN seems to argue that the SPA could supersede the General Agreement. But, clearly, the SPA could not, by establishing a period of 30 rather than 55 days, have shortened the ten-day period.

It is evident from the clear words of the SPA, and also as interpreted using universal rules of construction that the 55-day period was not to be extended to a preempting shareholder.

2. The 10-Day Period Was a Mandatory Essential Condition.

KPN next argues that they could completely ignore the requirement that the preempting shareholder close within ten-days. KPN takes the position that they can act as if the ten-day requirement was never written into the General Agreement. KPN in short decided to just rewrite the General Agreement.

⁶⁹ Once Respondent (and by indirection the minority shareholders) looks to the SPA, then the choice of law in the SPA applies. This principle from the European Principles is the principle applicable under Dutch Law.

The failure of the preempting shareholders to close within the ten-day period would be breach that would result in termination of the preemptive right. For KPN to continue with the sale to the minority shareholder despite the breach of the ten-day closing requirement was a breach of their obligations to Valvision.

Within the confines of the General Agreement and under French law, the 10-day period was a mandatory condition. KPN argument rests solely on the position that the GA states that the minority shareholders will be "deemed to have waived their preemptive right" if the 20 day preemption period was not respected, but that the GA is silent when referring to the 10 day period to close.

However, KPN's argument ignores the fact that the 10-day requirement also had mandatory words "shall take place." The contract is written in the English language, and in the English language "shall take place" connotes a mandatory substantial condition. So, were one to properly translate "shall take place" in the legal context, one would have to translate it to connote a mandatory essential condition.

KPN's argument also ignores the fact that their interpretation is not only commercially unreasonable, but makes the ten-day requirement a nullity.

Moreover, even under French law, one does not need to use the words "essential condition" to make it an essential condition. Parties are free to establish mandatory essential conditions. The GA is clear that the 10-day period can be extended only to obtain necessary approval, but up until April KPN structured the SPA so that no approvals would be required, for the express purpose of invoking the ten-day requirement.

In practice, sales are often subject to the implementation of terms; if these terms are not implemented, the sale is not formed and may not be realized through compulsory enforcement. Each party is free to stipulate all sorts of conditions so that certain events occur before the formation of the sale or the transfer of property: procurement of a loan, payment of a fee, performance of a certain formality, etc. Article 1584 of the Civil Code (French) contains this meaning: "*a sale may be made unconditionally, or under conditions precedent or subsequent.*" On several occasions, the Court of Appeals held parties to be free, according to their mutual intent, to raise certain as conditions, certain events, even those *a priori* secondary or accessory (see. Cass. Civ. 3^{eme}, January 5, 1983, D 1983.617, note P. Jourdain; Cass Civ, 3^{eme} October 12, 1994, Defrénois 1995.738, obs. D. Mazeaud).

Finally, the mandatory nature of the ten-day period is buttressed by Article 3.3.2 of the SPA. Once the minority shareholders exercised their preemptive right, their rights were now implicated by not just the GA, but also by the SPA. Only if the 10-day period were mandatory would 3.3.2 be able to yield a commercially reasonable interpretation.

E. Failure to Deposit the Downpayment Was the Failure of a Material Condition Under the SPA

KPN also breached the SPA by waiving the explicit requirement that the purchaser under the SPA deposit a downpayment with the escrow agent. While on one hand, KPN wishes to use the SPA to provided 55 days to the minority shareholders to close, they then reverse themselves and say that the downpayment was not material.

But, KPN in every way treated the payment of the downpayment as highly material. Only weeks earlier KPN had take the position that it would not even sign the SPA until Valvision deposited the downpayment.

KPN now argues that the downpayment requirement was immaterial when applied to the minority shareholders. Yet, if the downpayment was not mandatory, why did KPN and the minority shareholders feel compelled to enter into the secret June 17, 1999 agreement?

In the June 17, 1999, secret agreement, KPN seems to be saying:

"The minority shareholders are not in default in not making the downpayment on May 31, 1999. And, neither are the minority shareholders in default by not closing by June 11, 1999. However, if the minority shareholders agree to close by June 30, 1999, then we will waive these non-existent defaults. ."

VII. COMPUTATION OF DAMAGES AND RELATED LAW

KPN is liable to Claimant for damages arising out its breach of the SPA. Under the SPA, Dutch law governs in the determination of the proper damages.

Unlike French law⁷⁰, Dutch law makes virtually no distinction for damages arising in tort as compared to damages arising under contract.⁷¹ In either case, Claimant may recover the lost benefit of its bargain. And, under Dutch law, in the breach of a contract of sale, a proper measure of damage is the difference between the price of the property under the contract, and the value of the property at the time of the breach, sometimes referred to as "abstract" damages.⁷²

If the buyer entered into a favorable contract at the time the contract was signed or if the value of the property increased during this period between the contract signing and the time the contract was to be consummate, and the contract is thwarted through breach by the seller, then damages are properly awarded based upon the difference between the contract price and the value of the property at the time of the breach.⁷³

⁷⁰ Claimant respectfully emphasizes that the context of the contract is Dutch (KPN)-English (CSFB) and American. There was NO French party to the SPA or negotiations involving the SPA. The specified law to be applied under the contract is Dutch law and this arbitration herein is an English arbitration. Accordingly, the governing frame of reference for damages herein is Dutch law as reflected by the perspective of the participants in the transaction—Dutch, American, and English.

⁷¹ Section 10 of Chapter 1 of Book 6 (Articles 6:96 – 6:110) Dutch Civil Code (hereinafter: *DCC*) re reparation of damage, applies to both damages based on tort and on default.

⁷² See Article 6:96 (1) DCC: "Patrimonial damage comprises both the loss incurred and the profit deprived." In case of a breach of contract (default) the debtor has to compensate the profit deprived (lost benefit), i.e. the claimant has to be put in the situation that would have existed had the default not occurred.

⁷³ Schadevergoeding (Deurvorst), art. 97, aant. 28: the Dutch Supreme Court (*Hoge Raad*) has accepted this 'abstract' way of calculating damages for breach of contract regarding purchase agreements. It should be possible to refer to a price to calculate the damage. Regarding commodities, there is an explicit statutory provision in Article 7:36 (1) DCC: "*Where a sale is set aside and the thing has a current price, damages shall equal the difference between the price provided for in the contract and the price current on the day of non-performance.*"

These principles generally are described in the Unidroit Principles.⁷⁴

UNIDROIT PRINCIPLES:

Article 7.4.3 CERTAINTY OF HARM

- (1) Compensation is due only for harm, including future harm, that is established with a degree of certainty.
- (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
- (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

Article 7.4.4 FORESEEABILITY OF HARM

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

Article 7.4.5 PROOF OF HARM IN CASE OF REPLACEMENT TRANSACTION

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

Article 7.4.6 PROOF OF HARM BY CURRENT PRICE

(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for the goods delivered or services rendered in comparable circumstances at the place where the contract should have

⁷⁴ We refer to the Unidroit Principles as a convenient frame or reference and do not suggest that they are binding on the Tribunal. These principles similarly are reflected in the European Principles of Contract Law:

Article 9:502 (ex art 4.502): General Measure of Damages

The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived.

Article 9:506 (ex art. 4.505): Substitute Transaction

Where the aggrieved party has terminated the contract and has made a substitute transaction within a reasonable time and in a reasonable manner, it may recover the difference between the contract price and the price of the substitute transaction as well as damages for any further loss so far as these are recoverable under this Section.

Article 9:507 (ex art. 4.506): Current Price

Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further loss so far as these are recoverable under this Section.

been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

Claimant recognizes that one cannot use a speculative approach as to the value of the RCF shares in June 1999 when KPN breached the contract. It is the burden of Valvision as Claimant to establish the value of the RCF shares, but absolute certainty is not required in showing such value.⁷⁵

But, Claimant does not have to engage in any speculation whatsoever. There is abundant evidence as to the value of the RCF and cable systems in France and Europe in 1999. The evidence includes the contemporaneous bid of InterComm Holdings for RCF, the purchase of the RCF shares by UPC, the purchase of InterComm holding by UPC, the purchase of Videopole and Time Warner by UPC, and even the purchase by the Innovative Group of Valvision S.A., Martinique TV Cable SA, and World Satellite Guadeloupe SA. There are independent analyses of other French and European cable acquisitions. Indeed, the activity in cable acquisitions in 1999 and 2000 provide ample information of the purchase and sale of what was almost had become a commodity.

As permitted under Dutch law (see below) Valvision has chosen not to attempt to ask for damages based upon the impact on its business operations: these are real damages, but computation is complex. There is no doubt that KPN, in breaching the contract, dealt a very strong blow to the operations of Valvision in France as described in the accompanying affidavit of John Raynor. C-94. The loss of RCF has left Valvision with an operation, which is far less economical because of its small size. Valvision has lost all opportunities of synergy with its existing French cable operations. Moreover, opportunities to purchase other French cable companies are limited.

These damages to Valvision, although real, would require numerous witnesses to establish: for example, cable companies when purchasing content receive better prices if they have more customers—but, to prove that would require numerous industry experts and would need to assume how content providers would price their products. How does one place a number on the loss of bargaining position with cable content providers with extensive testimony on those subjects? How does one place a number on the inability of a small company to pay for managers and employees expert in multiple technologies or a myriad of other experts and others expert in marketing and other in finance? However, to attempt to compute damages on this basis is highly complex and would lead to inevitable claims by KPN that the damage estimate are hypothetical—yet the damage is real.

In such cases, Dutch law permits another alternative. The other alternative, and the one chosen here are "abstract" damages as such term is used in Dutch Law. Specifically permitted under Dutch law, the amount of damages would be the difference between the contract price and the market value at the time of the breach.⁷⁶

These "abstract" damages, notwithstanding the word, are not in anyway hypothetical—the damages are markedly shown by the UPC purchase price and the InterComm bid for RCF. It is of course proper to and it is reasonable to assume that Valvision may have elected to take a quick profit had the opportunity been available. Certainly, KPN cannot argue that Valvision, had it

⁷⁵ Article 6:97 DCC mentioning that absolute certainty regarding the damages is not required: "*The Court shall assess the damage in a manner most appropriate to its nature. Where the extent of the damage can not be determined precisely, it shall be estimated.*" Moreover, this article applies to the proof of the damages which should be established by claimant. The discretionary power of the Court might lead to a less heavy burden of proof by claimant (see: Schadevergoeding (Deurvorst), art. 6:97, aant. 9).

⁷⁶ See discussion above at n. 72 and n. 73

acquired RCF, would have refused to sell to InterComm at the price offered by InterComm. This is of course the idea behind awarding damages on this basis.

Dutch law does require that the damages be reasonable and equitable.⁷⁷ As to equity, it is clear that KPN's breach of contract was done with complete knowledge that they were breaching the contract. KPN acted in bad faith and conducted activities against Valvision's interest. And, the damages Claimant suggests are reasonable.

The facts proved in this arbitration permit Valvision to demonstrate its damage and to demonstrate the value of the RCF shares at the time of the breach. In order to demonstrate this damage, Valvision relies upon uncontested indications of the "price current at the time the contract is terminated."

As is explained in the accompanying Affidavit of James Heying (C-98), Valvision's contract with KPN was to purchase a system for 74,000⁷⁸ subscribers at a price equivalent to approximately €747 per subscriber. The valuation per subscriber is used because it is the factor most commonly used in evaluating cable systems. Mr. Heying's computations involve converting the currency to Euros, adjusting for a sale of 100% of the shares and then adding in the long-term debt.⁷⁹ This yields the computed value of the enterprise based upon the cash acquisition price plus the long term debt: the enterprise value. Then, the enterprise value is divided by the number of subscribers. C-98.

The following table shows how the enterprise value and the value per subscriber were computed for the Valvision-KPN contract, the UPC RCF contract, and the InterComm Holdings bid. See Exhibit 96-Table A.

	Contract	73.775%	95.763%	100%	Debt	Enterprise Value	Subs	Per Sub
Valvision - KPN (Vision) Contract April 19, 1999	29,612,541 NLG for 73.775%	€ 13,437,579	€ 17,442,533	€ 18,214,272	€ 37,033,200	€ 55,247,472	74,000	€747
InterComm Bid April 19, 1999	187,000,00 0 FFr for 73.75%	€ 28,498,800	€ 36,992,621	€ 38,629,346	€ 37,033,200	€ 75,662,546	74,000	€ 1,022
UPC Purchase From Minority Shareholder June 1999	172,372,85 1 FFr for 95.763 %	€ 20,237,893	€ 26,269,622	€ 27,431,912	€ 37,033,200	€ 64,465,112	74,000	€871

This information is available for other transactions based upon publicly available filings as supplanted by press releases and supported by independent analysts.

In order to establish the value of RCF, the following comparable transactions in 1999 and early 2000 may be used:

⁷⁷ See Article 6:2 (1) DCC: "*An obligee and obligor must, as between themselves act in accordance with requirements of reasonableness and fairness.*"

⁷⁸ Although the offering materials state that the number of subscribers was approximately 72,000, by June 1999, apparently this had increased to 74,000.

⁷⁹ Sometimes, the long-term debt is not disclosed completely by companies completing acquisitions. UPC apparently did not want others to know how much it was really paying.

€872 per subscriber. The purchase price paid by UPC on June 29, 1999 for RCF .

€1023 per subscriber. The offer price made on April 19, 1999 for RCF by InterComm Holding to KPN and the minority shareholders.

€1173 per subscriber. The purchase price paid by UPC for Videopole which was announced by UPC on June 17, 1999 in the same press release which announced the UPC acquisition of RCF. C-77, Page 1.

€1575 per subscriber. The purchase price paid by UPC for the Time Warner Properties. This purchase was announced on March 29, 1999 and was concluded in August 1999.

€3300 per subscriber. The purchase price paid by UPC for the purchase of InterComm France from InterComm holdings. This transaction was announced in December 1999 and closed in February 2000. It seems apparent that the acquisition was under negotiation from May 1999 on. The cash price per subscriber was €1241 per subscriber.

€1695 The average price paid per subscriber according to the IDATE 2000 report on European Cable. "Transactions carried out in the cable network sphere in 1999-2000 clearly reveal huge differences in prices: the average price per subscriber stood at **€1,695 in Europe**, compared to **€4,854 in the United States.**"

€1601 per subscriber. The purchase price paid by Valvision in December 1998 for the acquisition of the Valvision S.A. French systems.

€2093 per subscriber. The purchase price paid by Innovative in June 1999 for the acquisition of the Martinique cable system.

€1841 per subscriber. The purchase price paid by Innovative in January 2000 for the acquisition of the Guadeloupe cable system.

Using the same methodology, Schedule B to Exhibit 96 is a table of the damages to Valvision based upon the valuation per subscriber of comparable transactions. The table uses the above transactions and computes the value that RCF would have had using the per subscriber figures above. Then, a computation was made as to the difference between the RCF contract price and these comparative values to arrive at the damages.

It would be appropriate to use the €3300 per subscriber paid by UPC for InterComm France only a few months later as a basis for computing the value of the RCF shares in June 1999. The InterComm transaction was the next French transaction after the UPC purchase on the RCF shares. If the InterComm price were used, then an mathematical computation would show that the damages resulting from KPN's breach would be €181 million.⁸⁰ A fantastic figure? Not at all. UPC paid InterComm Holdings €100 million for a system 40% the size of RCF.

However, were the Tribunal to take a most conservative view of the damages, it should look to the difference between the Valvision contract price and the price InterComm bid for RCF in April, 1999 and the damages using that bid price would be computed to be €19.6 million.

⁸⁰ This damage figure and the next two assumes that the minority shareholders, absent the collusion, would have tagged along and then assumes 95.763% of the shares would have been acquired by Valvision.

However, even the InterComm Holdings bid price was below market price--InterComm had sensed an opportunity, and this was merely its first bid. It knew that Valvision had a contract or bid and that it may face an auction, so, this was merely an opening number. InterComm Holding had its own sense of the value of French cable properties, as indicated by the much higher price paid by UPC to it not many months later.

This price is still substantially below the average prices paid in France and Europe, and far below what the Innovative Group itself paid for Valvision S.A. (€1602, Guadeloupe €1841, and Martinique €2094) during the same time period. In fact, the Innovative Group closed on the Martinique deal in June 1999.

The most appropriate value to use is the average value of cable acquisitions in France and Europe in 1999-2000 as stated in the IDATE--€1695 per subscriber. Thus, using that amount, the damages due to Valvision would be €67.2 million based on the table shown above.

This average figure is fully supported by the analysis prepared by Mr. Heying.

Accordingly, Valvision request that it be awarded damages in the amount of €67.2 million.

Although under Dutch Law, damages are not limited to those that KPN could have reasonably foreseen in June of 1999, there is no doubt that KPN knew that the market placed a value at least as high as the InterComm bid.⁸¹ Further, as KPN and CSFB testified, KPN was selling RCF to Valvision for about 50% of the value on KPN's books. This is another indicator of the value of RCF.

VIII. CONCLUSION

In the final analysis, there is no requirement that Claimant establish the motives for KPN's breach. KPN's lack of good faith and its collusion with Brussels and Gillam are self-evident. Whatever KPN's motivation, KPN proceeded ahead after June 17, 1999 clearly aware that they were breaching the contract.

On the undisputed facts including undisputed dates, contract provisions, documents, and the actions of KPN, it is clear that KPN breached the SPA. Not only did KPN know that it was breaching the contract, but also it did so knowingly in the face of vehement objections by Valvision. KPN wanted two birds in hand, and, it even refused to return the downpayment unless Valvision agreed to close if the preempting shareholder did not close and as well to waive any claims against KPN.

KPN knew without any doubt that at the time of the breach, the value of RCF was far greater than the price Valvision would have been required to pay under the SPA. And, KPN colluded so as to facilitate the transfer of the increased value that belonged to Valvision to other parties, Brussels and Gillam and UPC.

KPN is liable for all damages to Valvision and those damages include the benefit of the bargain as well all the costs of the arbitration.

⁸¹ Under Dutch Law, reasonable foreseeability used to be the main criterion for the extent of the damages. Under current law, reasonable foreseeability is just one of the criteria. See Asser-Hartkamp 4 I, No. 435 ff.

Valvision requests that the Tribunal award damages based on the average value of cable transaction in France and Europe in 1999 and as well the costs of this arbitration. Further, Valvision requests that the Tribunal affirmatively state that KPN breached the SPA.

In that there is no merit to the counterclaim of KPN and KPN submitted no evidence in support of the counterclaim, the counterclaim should be dismissed with costs to Valvision.

April 2, 2001

Respectfully submitted,

Alan D. Sugarman, Esq. New York, NY

Ellen Bessis, Esq. Paris, France