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International Court of Arbitration • Cour internationale d'arbitrage

24 October 2002 – ssm/lhd (by fax only)

10555/KGA/DB

VALVISION TELECOMMUNICATIONS B.V. (The Netherlands) vs/ 1. VISION NETWORKS N.V. (The Netherlands); 2. VISION NETWORKS HOLDING B.V. (The Netherlands)

Counsel in charge of the file: Denis Bensaude **(Direct line: 33 1 49 53 29 06)**
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New York, New York 10023
U.S.A.

DHL

Dear Sir,

Further to our telephone conversation, please find hereafter attached a certified copy of the Award for your information.

Yours faithfully,

Lara Hammoud
Assistant Counsel
Secretariat of the ICC International Court of Arbitration

Encl.: mentioned

INTERNATIONAL COURT OF ARBITRATION
COUR INTERNATIONALE D'ARBITRAGE

FINAL AWARD
SENTENCE FINALE

CASE 10555/KGA/DB
AFFAIRE 10555/KGA/DB

VALVISION TELECOMMUNICATIONS B.V.
(The Netherlands)

vs/

VISION NETWORKS N.V.
(The Netherlands)

&

VISION NETWORKS HOLDING B.V.
(The Netherlands)

This document is a true certified copy of the Final Award rendered in conformity with the Rules of the ICC International Court of Arbitration.

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Ce document est une copie certifiée conforme de la Sentence Finale rendue conformément au Règlement de la Cour Internationale d'Arbitrage de la CCI.

In the matter of an arbitration

BETWEEN:

VALVISION TELECOMMUNICATIONS B.V.,

Claimant, Respondent in counterclaim

AND:

VISION NETWORKS N.V.,

VISION NETWORKS HOLDING B.V.,

Respondents, Counterclaimants,

CERTIFIED TRUE COPY OF THE ORIGINAL

PARIS, 23 October 2002

Anne Marie Whitesell

Anne Marie WHITESELL
Secretary General
ICC International Court of Arbitration

AWARD

ICC references 10555/KGA/DB

CHAMBRE DE COMMERCE INTERNATIONALE
COUR INTERNATIONALE D'ARBITRAGE
INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE

TABLE OF CONTENTS

SECTION I - THE FACTS AND THE PROCEDURE 4

I. ABBREVIATIONS - DEFINITIONS 5

§1. ACTORS 5
§2. DOCUMENTS 6

II. THE PARTIES 7

III. THE ARBITRAL TRIBUNAL 8

IV. BACKGROUND 8

V. SUMMARY OF THE ARBITRAL PROCEEDINGS 9

VI. FACTUAL OVERVIEW - HISTORY OF THE DISPUTE 14

§1. DENOMINATION OF THE RESPONDENTS 14
§2. THE BACKGROUND 15
§3. THE NEGOTIATIONS WITH VALVISION 15
§4. THE NOTIFICATION TO THE MINORITY SHAREHOLDERS 17
§5. THE AGREEMENT BETWEEN VISION N.V. AND THE CORE MINORITY SHAREHOLDERS 18
§6. THE REQUEST FOR ARBITRATION AND PROCEEDINGS IN THE FRENCH COURTS 19

VII. THE CLAIMS - THE RELIEF SOUGHT 20

SECTION II - THE DECISIONS 24

I. IN GENERAL 25

§1. THE JURISDICTION 25
§2. THE APPLICABLE LAW 25
§3. THE BASIS OF THE CLAIM 26
§4. THE DATE OF THE SPA 28

II. THE ALLEGED BREACHES 29

§1. THE BREACH OF THE CONFIDENTIALITY DUTY 29
§2. THE NOTIFICATION OF APRIL 29, 1999 31
§3. THE COMPUTATION OF THE 20 BUSINESS DAY PRE-EMPTION PERIOD 32
1. The applicable provisions 32
2. The position of the parties 33
3. Considerations 34
1. The relevant regulations 34
2. Banking practice in Paris 35
3. The wording of the clause 35
4. The purpose of the clause 36
5. The interpretation of the clause by the parties 36
6. Conclusion 38
§4. COLLUSION 38
§5. VISION N.V. AND VISION B.V.'S OBLIGATION TO PERFORM THE SPA IN GOOD FAITH 39
1. The position of the parties 39
2. Detailed sequence of the facts 42
3. The nature of the obligation to perform the SPA in good faith 44
4. Analysis of the letter of June 17, 1999 48
1. Point 1 of the letter 48
2. Point 2 of the letter 48
3. Point 3 of the letter 49
4. Point 4 of the letter 52
5. Point 5 of the letter 52
6. Point 6 of the letter 53

7. Conclusion 54
5. *The context of the letter of June 17, 1999* 54
6. *The contractual breach* 55
7. *The intentional nature of the breach* 59
§6. THE ASSIGNMENT OF THE PRE-EMPTION RIGHTS 60

III. THE CAUSAL NEXUS 60

IV. THE DAMAGES 62

§1. THE RELIEF REQUESTED BY VALVISION 62
§2. THE GENERAL PRINCIPLES APPLICABLE TO DAMAGES UNDER DUTCH LAW 62
§3. THE CONTRACTUAL LIMITATIONS OF LIABILITY ARE NOT APPLICABLE 63
1. *The principles applicable under Dutch law* 63
2. *Application of the principles to the case at hand* 65
§4. GENERAL PRINCIPLES APPLICABLE TO THE CALCULATION OF DAMAGES 66
1. *Estimation of damage* 66
2. *The abstract method* 67
§5. THE CALCULATION OF DAMAGES FOR BREACH OF CONTRACT BY VISION N.V. 69
1. *The abstract method* 69
2. *The calculation of the amount of damages due by Vision N.V. for breach of contract* 70
3. *Interest* 71
§6. THE COSTS OF THE ARBITRATION 71
1. *Arbitration fees* 71
2. *CSFB expenses* 72
3. *Valvision lawyers' fees* 73
§7. THE DECISION OF THE ARBITRAL TRIBUNAL CONCERNING THE SENTENCED PARTY 73
§8. TOTAL AMOUNT DUE 74

V. THE DECISIONS 74

SECTION I - THE FACTS AND THE PROCEDURE

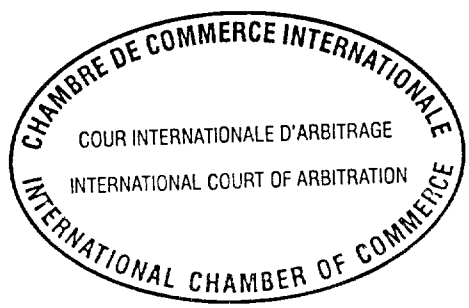
I. ABBREVIATIONS - DEFINITIONS

§1. ACTORS

Brussels	Brussels Securities S.A.
Core Minority Shareholders	Brussels and Gillam
CSFB	Crédit Suisse First Boston
DJ	Mr. De Jong
GBL	Groupe Bruxelles Lambert
Gillam	Gillam S.A.
KPN	Koninklijke PTT Nederland N.V.
Minority Shareholders	All the shareholders of RCF except for the Majority Shareholder, Vision
Non Core Minority Shareholders	All the minority shareholders of RCF except for the Core Minority Shareholders
Parties	Claimant and Respondents
Party	The Claimant, the Respondents or either of them as the context allows
RCF	Réseaux Câbles de France S.A.
Valvision	Valvision Telecommunication B.V.
VDH	Mr. Van der Hoeven
Vision	Vision Networks N.V. and Vision Networks Holding B.V.
Vision B.V.	Vision Networks Holding B.V.
Vision N.V.	Vision Networks N.V.

§2. DOCUMENTS

C#	Exhibit in Claimant's file
C.sub 1	Claimant's Submission no. 1
C.sub 2	Claimant's Submission no. 2
C.sub 3	Claimant's Submission no. 3
C.sub 4 Costs	Claimant's Submission on costs, numbered C.sub 4 by the Arbitral Tribunal
C.sub 5	Claimant's response to the Arbitral Tribunal's letter of November 28, 2001
C.sub 6	Letter from Claimant's counsel of January 10, 2002, numbered C.sub 6 by the Arbitral Tribunal
C.sub 7	Letter from Claimant's counsel of January 31, 2002, numbered C.sub 7 by the Arbitral Tribunal
General Agreement	General Agreement dated as of December 4, 1995 amongst Brussels, Gillam, N.S. Satel S.A., KPN Kabel, et al
R#	Exhibit in Respondents' file
R.sub 1	Respondents' Submission no. 1
R.sub 2	Respondents' Submission no. 2
R.sub 3	Respondents' Submission no. 3
R.sub 4	Respondents' Submission no. 4
R.sub 5	Respondents' response to Arbitral Tribunal's letter of November 28, 2001
R.sub 6	Letter from Respondent's counsel of January 24, 2002, numbered R.sub 6 by the Arbitral Tribunal
R.sub 7	Letter from Respondent's counsel of February 7, 2002, numbered R.sub 7 by the Arbitral Tribunal
SPA	Agreement for the sale and purchase of RCF between Vision N.V. and Valvision
SPA Core Minority Shareholders	Agreement for the sale and purchase of RCF between Vision, Brussels and Gillam, of June 17/18, 1999
Tr	Transcript of witness hearing



II. THE PARTIES

The parties in this arbitration are:

1. Claimant (Respondent in Counterclaim):
VALVISION TELECOMMUNICATIONS N.V.
1086C Joan Muyskenweg 4
Amsterdam
The Netherlands

Hereinafter referred to as "Valvision"

Represented by:
Me Ellen Bessis, Esq.
25, Avenue d'Eylau
F - 75116 Paris
France

Me Alan D. Sugarman, Esq.
Attorney at Law
17 W. 70 St. Suite 4
New York, NY 10023
United States

2. Respondents (Counterclaimants):
VISION NETWORKS N.V.
Maanweg 174
2516 AB The Hague
The Netherlands

Hereinafter referred to as "Vision N.V."

VISION NETWORKS HOLDING B.V.
Maanweg 174
2516 AB The Hague
The Netherlands

Hereinafter referred to as "Vision B.V."

Represented by:
Me Alfred J.M. Hoogveld, Esq.
Me Agnès Koetsier, Esq.
Loyens & Loeff
1, Avenue Franklin Roosevelt
F - 75008 Paris
France

III. THE ARBITRAL TRIBUNAL

The Arbitral Tribunal has been constituted as follows:

1. Eric Morgan de Rivery (appointed as Co-arbitrator upon proposal of the Claimant)
Lovells
37, avenue Pierre Ier de Serbie
75008 Paris
France

tel.: 00-33-1-53.67.47.47
fax: 00-33-1-53.67.47.48

2. Matthieu de Boisséson (appointed as Co-arbitrator upon proposal of the Respondents)
Darrois Villey Maillot Brochier
69, avenue Victor Hugo
75783 Paris cedex 16
France

tel.: 00-33-1-45.02.19.19
fax: 00-33-1-45.01.91.68/00-33-1-45.00.62.65

3. Jean-Marie Nelissen Grade (chairman of the Arbitral Tribunal, appointed upon joint proposal of the coarbitrators)
Linklaters De Bandt
13, rue Brederode
1000 Brussels
Belgium

tel.: 00-32-2-501.94.13
fax: 00-32-2-501.95.83

With the agreement of the parties, the Tribunal has appointed Me Françoise Lefèvre, residing in Brussels, as Secretary to the Tribunal.

IV. BACKGROUND

1. On April 19/22, 1999, Vision N.V. and Valvision signed an Agreement for the Sale and Purchase of 73.775% of the issued and outstanding share capital of Réseaux Câbles de France S.A (hereinafter referred to as "RCF") for an amount of NLG 29,612,541 (hereinafter referred to as the "SPA").

The obligation of Vision N.V. to sell the shares to Valvision was subject only to the rights of pre-emption held by RCF's Minority Shareholders contained in an

agreement entered into in 1995 between the shareholders of RCF (hereinafter referred to as the "General Agreement").

The General Agreement also provided for tag along rights to three Minority Shareholders. Had all the Minority Shareholders exercised their tag along rights, Valvision would have been obligated to purchase 100% of the shares.

The Core Minority Shareholders exercised their pre-emption rights on May 31, 1999. Valvision's position is that the Core Minority Shareholders did not exercise their pre-emption rights regularly in the manner specified by the General Agreement. Vision B.V. and Vision N.V. on the other hand holds the position that the pre-emption rights were duly exercised. Vision N.V. sold the RCF shares to the Core Minority Shareholders.

Valvision claims that "KPN" breached the SPA and is liable to Valvision for damages.

V. SUMMARY OF THE ARBITRAL PROCEEDINGS

2. By letter received on June 29, 1999, Valvision sent to the Secretariat of the International Court of Arbitration its Request for Arbitration against Vision N.V. and Vision B.V. and, later, nominated Mr. Eric Morgan de Rivery as Arbitrator.

On August 13, 1999, Vision N.V. and Vision B.V. filed their answer to the Request for Arbitration, designated Mr. Matthieu de Boisséson as Arbitrator and filed a counterclaim against Valvision.

On September 14, 1999, Valvision filed its reply to counterclaim.

On October 8, 1999, the ICC informed Mr. Jean-Marie Nelissen Grade of his appointment by the coarbitrators as Chairman of the Arbitral Tribunal.

On October 12, 1999, the Chairman accepted his appointment. He disclosed in his declaration of independence that, although neither he nor any member of the firm De Bandt, van Hecke, Lagae & Loesch of which he was a partner had any professional relationship with any of the parties to the arbitration, the English law firm Linklaters, associated with De Bandt, van Hecke, Lagae & Loesch within Linklaters & Alliance, had acted for Vision N.V. in the past, prior to the change of control of the company, and was handling one outstanding matter in relation to an employment dispute in which it had been acting for some time. The Chairman declared however that he believed that these circumstances did not affect his independence.

On October 18, 1999, Vision N.V. and Vision B.V. confirmed that they did not have any objection to the appointment of Mr. Jean-Marie Nelissen Grade as Chairman of the Arbitral Tribunal.

On October 20, 1999, Valvision confirmed likewise.

On October 27, 1999, the Secretary General of the ICC International Court of Arbitration confirmed Mr. Jean-Marie Nelissen Grade as Chairman of the Arbitral Tribunal and forwarded the file to the Arbitrators.

3. Upon invitation of the Chairman of the Arbitral Tribunal, Valvision filed on November 24, 1999 a summary of its position including a discussion of proposed relief as well as a schedule listing the parties and individuals involved in the arbitration and providing a chronology of major events.

On November 24, 1999, Vision N.V. and Vision B.V. filed a summary of their claims.

On December 17, 1999, the Arbitral Tribunal invited Vision N.V. and Vision B.V. to provide their own presentation of the facts as they had limited themselves to outlining specifically their claim.

On January 11, 2000, Vision N.V. and Vision B.V. filed their response to Valvision's reply dated September 13, 1999 and to Valvision's summary of claims dated November 24, 1999.

Considering the length of this document, Vision N.V. and Vision B.V. filed a brief summary of the facts on January 18, 2000.

On January 26, 2000, Valvision filed a memo "correcting misstatements made by Respondents in their answer of January 11, 2000 and their submission of January 18, 2000".

On February 17, 2000, the draft Terms of Reference were sent to the parties.

4. However, on November 23, 1999, Mr. Eric Morgan de Rivery had informed the ICC that he had noted that the arbitration procedure might indirectly involve a company called United Paneuropean Communication (UPC) and that one of his partners had provided assistance to a company in the UPC group in connection with the incorporation of the subsidiary of that company in France (Chello Broad Band). Although he did not see the situation as constituting a priori a conflict of interest, he asked for the position of the International Court of Arbitration as well as for the position of the parties.

On March 22, 2000, Valvision challenged Mr. Eric Morgan de Rivery as arbitrator pursuant to Article 11 of the ICC Rules and the proceedings were suspended until the issue of the challenge had been decided upon by the Court.

On April 27, 2000, the International Court of Arbitration rejected the challenge introduced by the Claimant against Mr. Eric Morgan de Rivery.

5. The Terms of Reference were signed during a hearing held on June 9, 2000.

6. On June 16, 2000, Valvision submitted its Claimant Submission no. 1 ("C.sub 1"), being Claimant's brief on applicable procedural rules, the Claimant's request for documents, Claimant's request for questions to be directed to Respondents and Claimant's list of discovery witnesses.

On June 19, 2000, the Arbitral Tribunal issued Procedural Order no. 1 providing, among other things, for the sequence and timing of the exchange of memoranda regarding discovery and providing for provisional dates for the hearing of witnesses.

On June 22, 2000, Valvision submitted an update of the document it had filed on June 16, 2000 in order to take into account the content of Procedural Order no. 1 and the transcript of the first hearing from the court stenographer.

On June 23, 2000, Vision N.V. and Vision B.V. submitted their Respondents' Submission no. 1 ("R.sub 1") on the issue of evidence, together with newly produced exhibits R.16 through R.22.

7. On August 10, 2000, the Arbitral Tribunal issued Procedural Order no. 2 which dealt with the following issues:

- applicable procedural rules: the Arbitral Tribunal would apply the mandatory provision contained in Section 33 of the English 1996 Arbitration Act, Articles 15 and 20 of the ICC Rules and, when the Rules are silent, would determine the applicable rules and might, if appropriate, refer to the IBA Supplemental Rules on the Taking of Evidence in International Arbitration;

- regarding the request for production of documents, the Arbitral Tribunal listed the documents it requested the parties to produce;

- regarding the discovery witnesses, the Arbitral Tribunal decided to hear Mr. Van der Hoven and Mr. Stumphius as witnesses, invited Mr. Behar to produce an affidavit covering the issues raised by the Claimant in the various briefs that it had filed and indicated that, after the hearing of the essential party witnesses, it would decide, at any party's request or on its own motion, whether to hear the party witnesses listed in sections B and C of Attachment 2 to C.sub 1.

8. On September 5, 2000, CSFB informed the parties that as a matter of firm policy, it did not give evidence or disclose documents in a litigation or arbitration with third parties unless compelled to do so by court order.

On September 21, 2000, Vision N.V. and Vision B.V. filed additional evidence relating to the annual shareholders' meeting of RCF held on May 19, 1999.

During the hearing held on September 25, 2000, Mr. Stumphius and Mr. Van der Hoeven were heard as witnesses. Mr. Behar, although called, did not appear.

9. On September 29, 2000, the Arbitral Tribunal issued Procedural Order no. 3 whereby it:

- formally invited Mr. Behar and Mr. de Jong to appear before it in order to testify in the case and requested the production by CSFB of any correspondence with respect to the declarations of interest or offers made by UPC or any affiliated companies, or by Intercomm Holdings with respect to the purchase of RCF shares from Vision N.V.;

- invited Vision N.V. and Vision B.V. to communicate copies of the confidentiality agreement and the letter of intent signed by Valvision;

- addressed several questions to the parties;

- fixed the schedule for the exchange of memoranda and for the oral hearing to be held on March 19, 2001.

On October 4, 2000, Vision N.V. and Vision B.V. filed Exhibits R.32 to R.34.

10. On October 17, 2000, CSFB confirmed its policy not to give evidence or disclose documents in a litigation or arbitration unless compelled to do so by court order.

On October 30, 2000, Valvision filed a copy of the witness subpoena application for Mr. de Jong and Mr. Behar that it had made before the High Court of Justice, Queen's Bench Division, Commercial Court on October 24, 2000.

The parties and the Arbitral Tribunal consequently agreed to wait until they received the court order and obtained the response of CSFB before rescheduling the filing of the briefs by the parties.

On November 29, 2000, the English Court granted the witness subpoena for Mr. de Jong.

On January 23, 2001, CSFB indicated that the subpoena issued against Mr. de Jong did not entitle Mr. de Jong to communicate any documents belonging or held by CSFB or to produce them at the hearing without the consent of CSFB. As CSFB was not prepared to consent to the disclosure of documents unless compelled to do so by court order, a summons should be obtained against CSFB rather than against Mr. de Jong in his personal capacity.

On January 25, 2001, Valvision filed the necessary witness summons naming CSFB.

On February 6, 2001, a witness summons issued by the Admiralty and Commercial Registry was served on CSFB.

11. Mr. de Jong was heard as a witness on February 21, 2001. CSFB disclosed at the hearing all the documents possessed by CSFB, which fell within the terms of the witness summons issued against CSFB for the period December 1, 1998 to June 30, 1999.

On February 23, 2001, the Arbitral Tribunal informed CSFB that it was not requesting any additional documents at this stage.

12. On February 27, 2001, the Arbitral Tribunal issued Procedural Order no. 4 fixing a new schedule for the exchange of memoranda and a new date for the hearing of the parties on July 10, 2001.

On April 2, 2001, Valvision filed its Submission no. 2 (C.sub 2).

On April 20, 2001, the schedule for the filing of the memoranda was revised.

13. On May 10, 2001, the Arbitral Tribunal issued Procedural Order no. 5 dealing with the question of the languages to be used in the documents submitted as evidence.

On May 16, 2001, Vision N.V. and Vision B.V. filed their Submission no. 2 (R.sub 2).

On June 7, 2001, Valvision filed its Submission no. 3 (C.sub 3).

On July 29, 2001, Vision N.V. and Vision B.V. filed their Submission no. 3 (R.sub 3).

A hearing was held on Tuesday July 10, 2001 in Brussels, at the office of the Chairman of the Arbitral Tribunal.

14. On August 31, 2001, Valvision filed a submission in support of its claim for costs and expenses (C.sub 4 Costs).

On October 4, 2001, Vision N.V. and Vision B.V. filed their Submission no. 4 responding to the Claimant's submission on costs dated August 31, 2001 (R.sub 4).

15. On November 28, 2001, the Arbitral Tribunal invited the parties to comment on the conditions under which the pre-emption rights were exercised, and in particular with respect to the reimbursement made by Vision N.V. to the Minority Shareholders of an amount of FRF 800,000 with respect to certain severance payments made by RCF.

On December 14, 2001, Valvision submitted the requested response (C.sub 5).

On December 21, 2001, Vision N.V. and Vision B.V. submitted their response (R.sub 5).

Despite the request made by the Arbitral Tribunal that the parties refrain from additional exchanges, the parties filed the following submissions:

- C.sub 6: Letter from Valvision's counsel of January 10, 2002, numbered C.sub 6 by the Arbitral Tribunal
- R.sub 6: Letter from Vision N.V. and Vision B.V.'s counsel of January 24, 2002, numbered R.sub 6 by the Arbitral Tribunal
- C.sub 7: Letter from Valvision's counsel of January 31, 2002, numbered C.sub 7 by the Arbitral Tribunal
- R.sub 7: Letter from VisionN.V.' and Vision B.V.'s counsel of February 7, 2002, numbered R.sub 7 by the Arbitral Tribunal

On March 1, 2002, the Arbitral Tribunal notified the parties that the procedure had closed.

VI. FACTUAL OVERVIEW - HISTORY OF THE DISPUTE

16. Before reviewing the issues that are before this Tribunal and the claims and counterclaims that have been asserted, it is necessary to put the dispute in its context. This section contains a general overview, in an attempt to set out the essential facts, which constitute the basis of the claims.

§1. DENOMINATION OF THE RESPONDENTS

17. Vision N.V., a company registered under the rules of Dutch law, is 100% owned by Vision B.V., also registered in the Netherlands. Vision B.V. is 100% owned by KPN.

Vision B.V. is the holding company for KPN Kabel assets throughout Europe.

In its submissions, Valvision consistently refers to "KPN" in order to refer to either KPN, Vision N.V. or Vision B.V. KPN is not a party to this arbitral procedure and the Arbitral Tribunal will therefore use the terms "Vision", "Vision N.V.", "Vision B.V." and "KPN" where specifically appropriate, and as previously defined (see above p. 5).

In particular, the Arbitral Tribunal will use the generic term "Vision" when none of the parties involved has indicated precisely which company was referred to and when the documentary evidence has not allowed precise identification.

§2. THE BACKGROUND

18. On December 4, 1995, KPN and the then existing RCF shareholders, including Gillam and Brussels, entered into the General Agreement pursuant to which KPN obtained a controlling interest in RCF (C.1).

It is not contested that in November 1996, on European antitrust grounds, KPN was required by the Dutch authorities to divest 80% of its Dutch cable assets within a short time. KPN therefore decided to dispose of all its cable interests. Vision N.V. and Vision B.V. started negotiations in order to sell their direct and indirect subsidiaries in Europe.

Vision N.V. and Vision B.V. retained CSFB as advisor and intermediary for these negotiations and transactions. At CSFB, Mr. Adam de Jong and Mr. Ronny Behar were in charge of the file. In April 1997, CSFB prepared an information package for the sale of RCF.

At Vision N.V. and Vision B.V., Mr. Van der Hoeven was in charge of the negotiations with Mr. Wunderink. Vision N.V. and Vision B.V.'s legal counsel was Loyens & Loeff in Rotterdam and more specifically Mr. Stumphius and Mr. Booysen.

§3. THE NEGOTIATIONS WITH VALVISION

19. Vision N.V. and Vision B.V. explain without being contradicted that the original aim was to sell all the cable assets as one unit but it soon became apparent that Vision's network did not interest anyone as a whole. It was decided to split up the Vision network and to try to sell the cable assets company by company. Various subsidiaries were sold, but in the course of 1997 and 1998 no serious candidates had shown interest in RCF. By the time Valvision expressed an interest at the end of 1998, RCF shares had been on the market for about 2 years.

The shares of RCF were then held by

Vision N.V.:	73.775%: Majority Shareholder
Gillam:	17.94%: Core Minority Shareholder
Brussels:	4.047%: Core Minority Shareholder
SLF:	4.237%: Non Core Minority Shareholder.

Vision N.V., Gillam, Brussels and SLF were bound by the General Agreement and a Shareholders' Agreement of December 4, 1995.

20. Valvision contacted KPN through CSFB and submitted an indication of interest on October 29, 1998 (R.32) and a letter of intent on December 16, 1998 offering $60,000,000 for 100% of the RCF shares (R.33).

Vision N.V. acknowledged that Valvision's offer was half of the book value (R.48) but that overall it was pleased to receive the offer (VDH Tr at 111, DJ Tr at 46) and considered it interesting (R.sub 2, p. 8).

On January 19, 1999, a negotiation session took place in Rotterdam during which the negotiations broke down. The parties differ as to the cause of the breakdown. According to Valvision, Vision N.V. insisted on increasing the price above the $60,000,000 for debt and equity, and Valvision made a final offer of $64,000,000 and then decided to discontinue the negotiations when Vision N.V. wanted more (C.sub 2, p. 18).

According to Vision N.V. and Vision B.V., however, other issues were also at stake such as the price adjustment formula and especially the definition of RCF's net debt, a litigation between RCF and the city of Antibes and the departure of Mr. Esgain, CEO of RCF (R.sub 2, p. 8). It appears from R.52, however, that the purchase price was the stumbling block in the negotiations at the time.

21. After the negotiations broke down, Vision N.V. and Vision B.V. negotiated with the banks which had financed RCF in order to see whether the outstanding debt of RCF could be bought out (R.48 and R.51).

CSFB contacted Valvision again in early March 1999 to resume negotiations.

Mr. Van der Hoeven discussed with Mr. De Vos of Brussels and Mr. Gillard of Gillam the potential transaction with Valvision and the termination of Mr. Esgain's employment at the board of directors of Vision N.V., according to the terms of the Shareholders' Agreement on March 9, 1999 (R.sub 2, p. 8 and R.19).

Valvision alleges that contacts would have been taken by CFSB/Vision N.V. with UPC during that time but the other party contests this and this issue will be discussed below.

22. The negotiations were pursued between Valvision and Vision N.V. and various drafts of the SPA were prepared (C.sub 2, p. 25). On April 11, 1999, Valvision approved all the terms of the draft and asked that the final agreement be prepared for signature.

On April 12, 1999, RCF dismissed Mr. Esgain and Mr. Moineville was made the general manager of RCF (Exhibit R.20).

On April 15, 1999, the seller sent the final version of the agreement to Valvision for signature.

On April 19, 1999, Valvision signed the SPA for the sale of Vision N.V.'s 73.775% interest in the share capital of RCF for a price of NLG 29,343,781 and faxed the dated and executed copy of the agreement back to Vision's counsel (C.75, p. 29-30).

Vision N.V. refused to sign the fax until Valvision had signed the escrow Agreement (schedule I of the SPA) and wired the escrow amount of NLG 3,940,000 (C.8 and R.1).

Valvision disputed this procedure and stated that it would only sign the escrow Agreement and wire the escrow amount after it had received the SPA signed by Vision N.V.

Although Vision N.V. was of the opinion that the escrow payment had to take place first, it finally signed the SPA before the escrow amount was wired.

Mr. Van der Hoeven testified that he signed the SPA on April 21, 1999 (R.23). Pursuant to C.6 and C.75, p. 61, Vision N.V. signed the fax version of the SPA and faxed it back to Valvision on April 22, 1999. Mr. Stumphius (R.53) also confirms this.

Another copy of the SPA dated April 22, 1999 appears to have been signed by Vision N.V. and Valvision (R.39).

On April 23, 1999, Valvision instructed the bank to wire the escrow funds (C.75, p. 90).

§4. THE NOTIFICATION TO THE MINORITY SHAREHOLDERS

23. The SPA was subject to a condition precedent contained in its Articles 3.3.1 and 3.3.2 which provide as follows:

> *3.3.1. The Purchaser acknowledges that the Seller is under the obligation pursuant to article 4.3.1.d of the General Agreement, to notify the Minority Shareholders of the contemplated sale and transfer of the French Shares, in order to enable such shareholders to decide whether or not they exercise their pre-emptive and/or tag along rights under the General Agreement (hereinafter referred to as the "Minority Rights"). The Seller shall provide the Purchaser with written notice of the occurrence of the Notification Date, and shall cause the Notification Date to occur within three Business Days of the date of this Agreement.*
>
> *3.3.2. The Purchaser acknowledges and agrees that, 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), this Agreement will terminate automatically with immediate effect and without any liability of any Party towards the other for any reason whatsoever, except that the Downpayment (together with all interest thereon pursuant to the terms of the escrow Agreement) shall be returned to the Purchaser.

On April 29, 1999, Vision N.V. sent the notification of the sale to the Minority Shareholders (C.10, R.3, R.4, R.5). The issue as to whether this notification was made at the right time is disputed and will be discussed below.

The Core Minority Shareholders notified Vision N.V. on May 31, 1999 of their intention to exercise their pre-emption rights (C.13, C.14). Valvision argues that these notices were late, that the pre-emption rights should have been exercised on May 27, 1999 at the latest and that consequently the Core Minority Shareholders had waived all their pre-emption rights under the General Agreement. This issue will be discussed below.

§5. THE AGREEMENT BETWEEN VISION N.V. AND THE CORE MINORITY SHAREHOLDERS

24. On June 7, 1999, Brussels and Gillam entered into an agreement with Médiaréseaux in order to sell to Médiaréseaux the 73.775% of the share capital of RCF that they would acquire from Vision N.V. as well as their own shares in the capital of RCF, which altogether represented 95.763% of the share capital of RCF (C.17).

The purchase price to be paid by Médiaréseaux under this agreement for 95.763% of the shares amounted to NLG 57,909,251.25.

25. On June 14, 1999, Valvision asked for the return of its down payment (C.19).

Vision N.V. refused, stating that the obligation to repay the escrow amount would only arise after the shares were actually transferred to and paid for by the pre-emptors (C.21 and C.26).

26. On June 17 and 19, 1999, Vision N.V. and the Core Minority Shareholders entered into an agreement by which Vision N.V. sold 73.775% of the share capital of RCF to Brussels and Gillam (C.24).

Valvision argues that the conclusion of this agreement was a violation of the requirement under the General Agreement that the sale and payment of the purchase price should take place within 10 Business Days following the exercise of the pre-emption right.

On the same day, Vision N.V. waived the requirement that Brussels and Gillam make a down payment provided that Brussels and Gillam guaranteed the purchase price and agreed to close within 30 days (R.21). Valvision criticises this waiver as a modification of the conditions of the sale and a sign of collusion between the parties.

27. On June 29, 1999, Brussels and Gillam purchased from Vision N.V. 73.775% of the share capital of RCF, paid the total purchase price and retransferred the shares on the same day to UPC/Médiaréseaux (C.29, C.30, C.31).

§6. THE REQUEST FOR ARBITRATION AND PROCEEDINGS IN THE FRENCH COURTS

28. By letter received by the ICC on June 29, 1999, Valvision alleged that there had been a breach of the SPA and submitted to the Secretariat of the ICC the request introducing the present arbitration.

It also submitted a request to the President of the Tribunal de commerce of Nanterre in order to have 95% of the share capital of RCF seized ("*saisie séquestre conservatoire*"), for the period of the arbitration procedure (C.32).

Valvision alleged that the pre-empting Minority Shareholders had not exercised their pre-emption rights in accordance with the terms of the General Agreement and had therefore waived them.

The President of the Tribunal de commerce of Nanterre rendered an order authorising Valvision to seize the share capital of RCF on June 29, 1999 at 12 noon (C.33).

When the bailiff proceeded to the seizure of the shares of RCF on June 29, 1999 at 4.45 p.m., the shares of RCF had already been transferred by Vision N.V. to the Core Minority Shareholders (C.34).

On the same day, Brussels and Gillam, the pre-empting Core Minority Shareholders, submitted a writ of summons to the President of the Tribunal de commerce of Nanterre asking him to review his position.

On the same evening, the President of the Tribunal de commerce of Nanterre rendered a second court order confirming the seizure of the shares of RCF and nominated an "administrateur" to control the management of RCF.

Brussels and Gillam appealed before the Court of Appeal of Versailles. On August 6, 1999, the Court of Appeal of Versailles declared the seizure of the shares of RCF null and void (C.45).

29. On August 9, 1999, Valvision sought another court order from the President of the Tribunal de commerce of Nanterre requesting that the shares be put in escrow ("*séquestre*") (C.46). On August 13, 1999, a new court order placing the shares in escrow was issued by the President of the Tribunal de commerce of Nanterre (C.47).

The Court of Appeal of Versailles annulled the second court order on October 1, 1999 (C.72).

Valvision initiated proceedings against this decision before the Supreme Court on November 29, 1999 (C.68). The Arbitral Tribunal has not been informed that a decision would have been rendered by the Supreme Court.

VII. THE CLAIMS - THE RELIEF SOUGHT

30. In the Terms of Reference, Valvision requested in substance the following relief:

Merits

Valvision's claims are for (1) a ruling that Vision N.V. breached its contract to sell the shares to Valvision, (2) damages for breach of the said contract, and (3) a ruling that Respondent is required to cooperate in good faith with any effort Valvision may undertake to obtain ownership of RCF.

Damages

One measure of damages is the difference between the amount for which Vision N.V. agreed to sell its shares to Valvision (NLG 29,612,541 for 73.775%) and the price paid by Médiaréseaux to the Core Minority Shareholders. According to the June 7, 1999 contract entered into between the Core Minority Shareholders and Médiaréseaux, the amount paid was NLG 57.8 million for 95.7% of RCF. Adjusting for the difference in the number of shares, this would provide a minimum damages amount of approximately NLG 15,000,000 (€6,806,700).

Valvision intended to show that the price paid by Médiaréseaux in June 1999 was below the market price for similar cable systems such as Videopole and other cable systems in France sold since that time. According to Valvision, because of Médiaréseaux's willingness to tortiously interfere with Valvision's contract and to take the risk of becoming embroiled in litigation, it was able to purchase the shares below the market value. The value per subscriber of a cable network in France would be between €1,000 to €1,500 per subscriber. RCF had approximately 74,000 subscribers.

Valvision intended to show that the value to it was even greater because of the synergies that Valvision would have had as a result of owning RCF together with Valvision's present network.

Valvision had incurred substantial costs in pursuing this arbitration and the associated litigation and expected to incur further costs in pursuing Médiaréseaux for the ownership of RCF. It estimated these costs to be approximately €3,000,000.

Valvision requested that the Arbitral Tribunal determine these damages. Valvision would then decide whether to seek ownership of RCF or accept the damages.

Claimant requested under the heading "Injunctive Relief", the following measures:

First, a statement that the Minority Shareholders did not exercise and consummate their pre-emption rights in a timely and effective manner as provided in the General Agreement.

Second, a statement that Vision N.V. violated the Sale and Purchase Agreement in not consummating the sale of the RCF shares to Valvision.

31. The relief sought by the Respondents in the Terms of Reference was in substance as follows:

"Merits"

Vision N.V. and Vision B.V. requested the Arbitral Tribunal to state that:

1. Vision N.V. did not breach the Sale and Purchase Agreement it had entered into with Valvision on April 22, 1999;

2. All of Valvision's allegations, requests and demands must be rejected;

3. Vision N.V. suffered and would suffer damages as a consequence of Valvision's arbitration request and other requests at the Tribunal de commerce of Nanterre, the Court of Appeal of Versailles and the Supreme Court. As the present procedure and the Supreme Court procedure were still pending, the exact amount of the damages could only provisionally be assessed as of today:

a) Lawyers' costs and expenses in the present arbitration procedure: estimated as of November 24, 1999 at FRF 500,000;

b) Lawyers' costs and expenses made in relation with the procedures at the Tribunal de Commerce of Nanterre, the Court of Appeal of Versailles, and the Cour de cassation (see also point "e" hereunder): estimated as of November 24, 1999 at FRF 600,000;

c) Damages to Vision N.V. and Vision B.V.'s commercial reputation: estimated as of November 24, 1999 at FRF 2,000,000;

d) Total (a+b+c) = FRF 3,100,000;

Vision N.V. and Vision B.V. reserved the right to adjust this amount in the course of the present procedure and the Supreme Court procedure.

e) On October 26, 1999, Valvision entered a recourse against the judgment rendered by the Court of Appeal of Versailles dated October 1, 1999 rejecting Valvision's request to have the RCF shares put in escrow until the decision of the present Arbitral Tribunal.

If, as a result of the Supreme Court procedure and a new decision of a Court of Appeal, the shares of RCF were put in escrow and the present Arbitral Tribunal ruled in between that Vision N.V. had not breached the Sale and Purchase Agreement, Vision N.V. could suffer severe damages as it could receive a claim from Médiaréseaux and/or Brussels and Gillam;

Vision N.V. and Vision B.V. expressly reserved the right also to enter a counterclaim against Valvision for those damages mentioned under the present point 3.e.;

4. Valvision be ordered to pay the amount mentioned under 3 above.

Vision N.V. and Vision B.V. reserved the right to complete, substantiate and develop their responses to Valvision's request for Arbitration, reply and response to counterclaim dated September 13, 1999 and summary of claims dated November 24, 1999.

32. In C.sub 2, Valvision requested that it be awarded damages in the amount of €67.2 millions (p. 51). Valvision requested also that the Tribunal specifically state that "KPN" breached the SPA.

Valvision requested the Tribunal to declare that there was no merit to the Counterclaim and that the Respondents had submitted no evidence in support of the Counterclaim. Valvision also requested that costs be awarded in its favour (p. 52).

33. In R.sub 2, Vision N.V. and Vision B.V. requested that Valvision's claim be rejected (p. 39) and requested that Valvision be ordered to pay an amount of €221,952.52 corresponding to the costs of the various procedures:

- an amount of €63,131.75 ((FRF 182,299.70 = €27,791.41) + €19,242.49 + €16,097.85) paid to Loyens & Loeff in Paris for lawyers costs in the present arbitration procedure (R.55);

- an amount of NLG 14,828.65 (= €6,728.94) paid to Loyens & Loeff in the Netherlands for lawyers' costs in the present arbitration procedure (R.55);

- an amount of FRF 337,100 (= €51,390.56) paid to Gide Loyrette Nouel which handled the procedures at the "Tribunal de Commerce" of Nanterre and the Court of Appeal of Versailles (R.54);

- an amount of FRF 4,600 excl. VAT (= €701.27 excl. VAT) for translation costs (R.54).

In total, the Respondents had already paid an amount of €121,952.52 for lawyers and translation costs. As this amount was likely to be higher at the end of the present arbitration procedure, the Respondents asked that Valvision be ordered to pay an additional amount of legal assistance, procedural and translation costs incurred by the present procedure until its end, which in addition to the aforesaid amount could be set at €100,000.

The Respondents therefore requested that Valvision be ordered to pay a total amount of €221,952.52 (€121,952.52 + €100,000).

34. In C.sub 3, in order to expedite the proceedings, Valvision decided to modify the relief requested and to stipulate for these proceedings only damages in the amount of €15,000,000 even though it considered that its damages were greater and it reserved the right to pursue additional and other remedies (p. 44). The Claimant reserved the right to submit its claims for the costs of arbitration when the Tribunal directed it to do so.

35. In R.sub 3, the Respondents requested that the Arbitral Tribunal reject all of Valvision's allegations and requests for relief and order Valvision to pay €209,104.88 for legal fees and €1 as symbolic damages for damage to their commercial reputation.

The relief requested by the parties had not been modified before the hearing held on 10 July 2001, as confirmed by Valvision (Tr 10/7/2001, p. 42 and 43).

36. In C.sub 4 Costs, the Claimant has requested the payment of:

- its arbitration costs and expenses, which amount to €1,295,033.19;

- the reimbursement of its advances to the ICC in the amount of $268,500;

- the costs claimed by CSFB in the amount of £35,467.50.

37. In R. sub 4, the Respondents commented on the request filed in C.sub 4 Costs but did not modify their own request regarding the costs of the procedure.

SECTION II - THE DECISIONS

I. IN GENERAL

§1. THE JURISDICTION

38. Valvision has filed its arbitration request against Vision N.V. and Vision B.V.

The SPA containing the arbitration clause was signed only by Vision N.V. However, Vision B.V. has not contested the jurisdiction of the Arbitral Tribunal and has therefore implicitly, although certainly, accepted it and has fully participated in the whole procedure.

§2. THE APPLICABLE LAW

39. The parties are in agreement that the SPA is to be governed by and construed in accordance with the laws of the Netherlands (Section 12.12 of the SPA, C.sub. 2, p. 39, R.sub 2, p. 5).

The intention of the parties was therefore to submit the SPA to Dutch law, which will apply to the evaluation of the breaches of contract alleged by Valvision, as well as - if need be - to the determination of the damages caused by these breaches.

40. Pursuant to Section 12.14 of the SPA, the arbitrators will decide according to "de regelen des rechts", which refers to Dutch law, and excludes the possibility for the arbitrators to act as "amiables compositeurs".

41. Valvision submits however that the principles of construction of contracts and obligations are similar under Dutch and French law and are similar to the European principles of contract law. Because of the similarity, they refer to the European principles (C.sub 2, p. 39).

The Respondents reject the application of the European principles of contract law and the Unidroit principles as not being applicable in the case at hand (R.sub 2, p. 6).

42. Considering the express choice of law made by the parties in the contract, the Arbitral Tribunal must determine whether it has to apply the general principles within the framework of the national law chosen by the parties.

The preamble to the "Principles of International Commercial Contracts", issued by Unidroit, specifically provides that the parties may agree to submit their contract to these Principles, and that the Principles may apply when the parties de-

cide that their contract is subject to the general principles of law or to the lex mercatoria.

Considering in this case that the parties have made no reference to the above-mentioned Principles and that Article 12.12 does not refer to the lex mercatoria nor to any general principles as far as the SPA is concerned, the Unidroit Principles cannot apply (Award 8873, Journal de Droit International, 1998, 1017-1027).

The Arbitral Tribunal therefore rejects the applicability of the Unidroit Principles and of the European principles of contract law.

43. Finally, the Arbitral Tribunal will apply French law as far as the interpretation of the General Agreement is concerned, pursuant to its Article 16.

§3. THE BASIS OF THE CLAIM

44. Vision N.V. and Vision B.V. argue that although Valvision mentions a breach of contract, bad faith and collusion, no reference is made to the Dutch Civil Code and Vision N.V. and Vision B.V. are left to guess what might be the legal basis of Valvision's claim. In particular, the use by Valvision of the term "collusion" indicates that Valvision has possibly based its claim not only on breach of contract but also on tort.

Vision N.V. and Vision B.V. are of the opinion that, as the Terms of Reference do not include an action based on tort, any possible tort issue does not and cannot form part of the dispute (R.sub 2, p. 5).

Valvision has confirmed that the primary basis of its claim was contractual and that tort was an alternative basis (Tr. 10/7/2001, at 46).

45. Valvision alleges that Vision N.V. and Vision B.V. committed various breaches of the SPA by not delivering the RCF shares and by selling them to the Core Minority Shareholders on conditions that were different from those provided for in the SPA (deadlines, down payments, confidentiality and price adjustment formulae). Vision N.V. and Vision B.V. are alleged to have breached their obligations to perform the SPA in good faith by granting to the Core Minority Shareholders various facilities to purchase the shares.

For Valvision, these demands clearly constitute the basis for a contractual claim.

Valvision adds that Vision N.V. and Vision B.V., the Core Minority Shareholders and the final purchaser would have colluded to make their deal possible and to deprive Valvision of the benefit of the SPA.

The Arbitral Tribunal is of the opinion that these alleged fraudulent breaches may constitute intentional breaches of the SPA but that they retain their contractual nature as they exclusively relate to the causes of or the conditions surrounding the non-delivery of the RCF shares to Valvision pursuant to the SPA.

46. The Arbitral Tribunal will therefore review below the contractual breaches alleged by Valvision, which can be summarised as follows.

According to Valvision, Vision N.V. and Vision B.V. did not deliver to Valvision the RCF shares pursuant to the SPA, thus violating certain provisions of such SPA:

a) Vision N.V. and Vision B.V. breached the obligation of confidentiality they had undertaken towards Valvision by revealing too early to the Minority Shareholders Valvision's interest in the purchase of RCF shares;

b) Vision N.V. and Vision B.V. belatedly notified the Minority Shareholders of the conclusion of the SPA;

c) the Core Minority Shareholders belatedly exercised their pre-emption rights;

d) Vision N.V. and Vision B.V. violated their obligation to perform the SPA in good faith because they allowed the Core Minority Shareholders:

   - not to provide the down payment they had required from Valvision,

   - not to close within 10 Business Days,

   - to purchase RCF shares on conditions different from these under which the sale had been concluded with Valvision;

   Valvision refers specifically in this context to a letter of agreement dated 17 June 1999, between Vision N.V. and the Core Minority Shareholders kept secret until the arbitration proceedings;

e) Vision N.V. and Vision B.V. violated the prohibition to assign their pre-emption rights;

f) Vision N.V. and Vision B.V. in general colluded with the Core Minority Shareholders to deprive Valvision of its rights under the SPA and to help the Core Minority Shareholders exercise their pre-emption rights and resell the RCF shares to Médiaréseaux.

47. It appears from the list above that the Arbitral Tribunal will have to review, interpret and apply the SPA (subject to Dutch law) in assessing whether or not the non delivery of the RCF shares was unlawful, and more specifically as far as breaches a), b), and f) are concerned.

However, some alleged breaches (for examples breaches c), d) and e)) rely on the assertion that Vision N.V. and Vision B.V. breached the SPA by not holding the Core Minority Shareholders to strict compliance with the terms and provisions regulating the exercise of their pre-emption rights, as provided for by the General Agreement. In order to determine whether or not Vision N.V. and Vision B.V. breached the SPA by not strictly enforcing the General Agreement, the Arbitral Tribunal will need to review and interpret the General Agreement.

Before reviewing these various breaches, the Arbitral Tribunal will determine the date on which the SPA was signed.

§4. THE DATE OF THE SPA

48. After the negotiations resumed in March 1999, Valvision and Vision N.V. exchanged various drafts (C.75, p. 20, C.75, p. 24).

On April 11, 1999, Valvision approved all proposed terms and asked for a final agreement for signature (C.75, p. 26).

On April 15, 1999, the counsel for Vision N.V. faxed to Valvision an unexecuted copy of the final agreement for execution (C.75, p. 27).

The important exhibits were faxed at the same time but the entire package of exhibits was sent by courier and received by Valvision on April 19, 1999 (C.75, p. 28).

On April 19, 1999, Valvision dated and executed the faxed SPA and faxed the executed copy back to Vision N.V. (C.75, p. 29 and 30).

Vision N.V. required however that the down payment be made before it signed the SPA itself (C.8 and R.1) whereas Valvision required receipt of a fully executed SPA before wiring the funds.

Mr. Van der Hoeven testified that he signed the SPA on behalf of Vision N.V., on April 21, 1999 (R.23).

However, pursuant to C.6 and C.75, p. 61, the document bears the date of April 22, 1999. Mr. Stumphius, Vision N.V.'s counsel for the sale, also confirmed this date (R.53).

On April 22, 1999, at 19:12, Vision N.V. faxed to Valvision the faxed copy of the SPA now signed by both parties (C.75, p. 61).

Another original version was signed by Vision N.V. on April 22, 1999 and was sent by mail (R.39; R.sub 2, p. 1).

Valvision instructed its bank the next day, April 23, 1999, to wire the down payment (C.75, p. 90).

49. The question arises as to the date on which the SPA must be considered as having been entered into. Valvision argues that the date of the SPA was April 19, 1999 (C.sub 2, p. 41) and Vision N.V. that it was April 22, 1999 as only on that date had both parties duly signed it (R.sub 2, p. 9).

Vision N.V. and Vision B.V. have filed an affidavit from Nauta Dutilh (R.57), which explains that the transfer of the ownership of shares cannot take place by the mere consent of the parties but that the transfer of the purchased item is required.

Valvision argues however that under Dutch law, in the absence of specific provisions, the meeting of wills suffices to create the contract (Tr 10/7/2001 at 11 and 12).

The Arbitral Tribunal is of the opinion that it is not necessary to determine the content of Dutch law relating to the transfer of the ownership of shares. Indeed, it appears from the above review that until April 22, 1999, the parties did not even agree on one element that appeared to be one of prime importance, i.e. the timing of the down payment, as Vision N.V. refused to sign the contract as long as this down payment had not been made. The parties clearly only reached final agreement on this issue on April 22, 1999 when Vision N.V. finally agreed to fax the signed version of the SPA to Valvision before the wiring of the down payment.

The Arbitral Tribunal will now review the breaches alleged by Valvision.

II. THE ALLEGED BREACHES

§1. THE BREACH OF THE CONFIDENTIALITY DUTY

50. Valvision argues that, knowing that Valvision was returning to Europe with its negotiating team, Vision N.V. called on March 9, 1999 a meeting of the Strategic Committee of RCF (R.19; C.sub 2, p. 20), which was attended by Mr. Van der Hoeven, Mr. De Vos and Mr. Gillard, the representatives of the Core Minority Shareholders.

The minutes of the meeting indeed show that two matters were discussed, i.e. the termination of Mr. Esgain, the managing director of RCF, and the proposed acquisition of RCF by Valvision (R.19).

Valvision is of the opinion that in disclosing the above information to Mr. De Vos and Gillard, Mr. Van der Hoeven violated the confidentiality owed to Valvision pursuant to its letter of intent sent on December 16, 1998 to KPN N.V. (R.33) and that Mr. Van der Hoeven provided the Core Minority Shareholders with advance notice and inside information on the financial terms of the deal agreed upon in principle with Valvision.

51. During his testimony, Mr. Van der Hoeven explained that the Strategic Committee had to be consulted on all management matters under the Shareholders' Agreement entered into with Gillam and Brussels, that the agreement under negotiation between Vision N.V. and Valvision required the termination of Mr. Esgain's employment contract with RCF and that he felt compelled to bring the matter of Mr. Esgain's discharge to the attention of the Strategic Committee (VDH, Tr at 68 and R.23).

According to Article 2.4.4. of the Shareholders' Agreement (C.90), Mr. Van der Hoeven had indeed the obligation as a member of the Strategic Committee of RCF to discuss with Brussels and Gillam the appointment, termination and compensation of the managing director of RCF.

Valvision argues that Mr. Van der Hoeven has not explained why this meeting and discussion could not have waited until the official notification to the Minority Shareholders of the sale, if not later. It does not seem, however, from the transcript of Mr. Van der Hoeven's hearing that this question was put to him.

Valvision also argues that under the SPA, Mr. Esgain's employment contract did not need to be terminated until July 1999 (Tr. 10/7/2001 at 6). However, the Arbitral Tribunal notes that, in March 1999, Vision N.V. could not have been aware of the deadlines finally provided for in the SPA that was to be signed in April 1999.

In addition, Vision N.V. and Vision B.V. rightly argue (R.sub 3, p. 24) that Brussels and Gillam were members of the RCF board and that Valvision, before making a firm bid, had to proceed with a due diligence. According to Vision N.V. and Vision B.V., a due diligence investigation of a firm cannot be kept secret from its board which decides to authorise the due diligence in the interests of the company and which provides the information to the interested buyer (see also R.sub 2, p. 29).

52. It could not be argued, as Valvision does, that informing the members of the Strategic Committee before signing the SPA would constitute a breach by Vision N.V. and Vision B.V. of a confidentiality agreement existing between Vision N.V. and Vision B.V. and Valvision. It does not appear indeed that any confidentiality agreement binding the parties existed. The bundles of exhibits do not contain the confidentiality agreement that CSFB addressed to Valvision for signature as a matter of standard procedure when starting the negotiations.

The standard confidentiality agreement that CSFB uses (C.82) does not contain any confidentiality obligation to which the seller is bound, as the confidentiality obligation only binds the purchaser.

Valvision could not refer to Exhibit R.33, being its offer dated December 16, 1998 (C.sub 2, p. 20), as this letter was not signed by Vision N.V. which therefore never accepted the confidentiality provision (R.sub 2, p. 30).

53. As a conclusion, the Arbitral Tribunal is of the opinion that:

- Mr. Van der Hoeven was under the obligation to inform the Minority Shareholders of the dismissal of Mr. Esgain, a key condition to finalising the deal with Valvision;

- there was no confidentiality obligation on Vision N.V. nor on Vision B.V.;

- the Minority Shareholders who were members of the board of directors of RCF were bound to be informed of the due diligence investigation of said company that was being conducted by Valvision.

The information that was given by Mr. Van der Hoeven to the Minority Shareholders on March 9, 1999 does not constitute a violation of the SPA.

§2. THE NOTIFICATION OF APRIL 29, 1999

54. The written notification of the sale was sent to the Minority Shareholders on April 29, 1999 (C.sub 2, p. 27 and following; R.sub 2, p. 16; R.3, R.4, R.5, R.29).

Valvision argues (C.sub 2, p. 41) that Vision N.V. delivered the notification to the Minority Shareholders too late because the SPA required that the notification be given within three days of the date of the SPA (Article 3.3.1. of the SPA).

Vision N.V. and Vision B.V. respond that as the SPA was signed on April 22, 1999, and the notification occurred on April 29, 1999, the notification was sent 4 Business Days afterwards, instead of 3 Business Days afterwards, and that a one-day delay could not be considered as a sign of fraudulent collusion (R.sub 2, p. 17).

55. The Arbitral Tribunal is of the opinion that Vision N.V. breached Article 3.3.1. of the SPA by notifying the Minority Shareholders of the sale outside the period provided for in the SPA.

Indeed, the notification took place either 1 day late if April 22, 1999 is considered to be the effective date of the SPA or 4 days late if April 19, 1999 is considered - as Valvision maintains - to be the effective date of the SPA.

However, this breach lacks any causal nexus with the alleged damage.

Indeed, Vision N.V. was under the obligation regardless of the provisions of the SPA to notify the Minority Shareholders of the sale to Valvision, pursuant to the provisions of the General Agreement.

Valvision was aware of this obligation as the SPA expressly referred to the compulsory procedure to be followed towards the Minority Shareholders (SPA, §3.3.1.).

The General Agreement, although entered into between KPN and the Minority Shareholders (KPN to whom Vision N.V. had succeeded as shareholder of RCF), was valid as against Valvision, pursuant to the external effects of contracts (article 1165 of the French Civil Code).

As a consequence, Valvision was obliged to acknowledge the existence of the General Agreement and respect its consequences. The Minority Shareholders had the right under the General Agreement to be notified of the sale to Valvision, whether or not this notification took place within the deadline provided for in the SPA.

Therefore, the causal connexion between the failure and the claimed damages required by Article 6: 74 (NBW) §1 lacks.

56. Furthermore, the purpose of the 3 Business Days notification period was to ensure that Valvision was not left uncertain as to the possible exercise of their pre-emption rights by the Minority Shareholders. This 3-day period from the SPA combined with the 20-day period for the exercise of the pre-emption right under the General Agreement gave the measure of Valvision's period of uncertainty.

The fact that the initial 3-day time period was exceeded had only one consequence, i.e. the extension by one or 4 days of the period of uncertainty, as the Core Minority Shareholders ended up exercising their rights.

Once the pre-emption rights had been exercised under the General Agreement, this technical violation of the 3-day period for notification under the SPA could not have caused damage different from that resulting from the exercise of the pre-emption rights.

The Arbitral Tribunal will now review the modalities of the exercise of the pre-emption rights.

§3. THE COMPUTATION OF THE 20 BUSINESS DAY PRE-EMPTION PERIOD

1. The applicable provisions

57. According to the General Agreement, Brussels and Gillam benefited from a pre-emption right in case of sale of the RCF shares by the Majority Shareholder. The significant provision regarding the pre-emption right is encompassed in Article 4.3.2 of the General Agreement. A schedule of the applicable

paragraphs of this provision appears on page 9 of C.sub 2. Vision N.V. agrees with this schedule except that it considers that Articles 4.3.2.b, §5 and 4.3.2.c of the General Agreement are also applicable in the case at hand (R.sub 2, p. 14).

The parties also agree that the General Agreement is subject to French law according to its Article 16 and that any difficulty of interpretation arising out of the General Agreement has to be solved pursuant to the rules of French law (R.sub 2, p. 14; C.sub 2, p. 40).

58. Pursuant to Article 4.3.2.a (i) of the General Agreement, the Minority Shareholders had to notify their intention to exercise their pre-emption rights within 20 Business Days from the notification by Vision N.V. in which it informed the Minority Shareholders of the SPA entered into with Valvision.

The parties differ as to the interpretation to be given to the definition of Business Day provided for in the General Agreement.

2. The position of the parties

59. Valvision argues that, even taking April 29, 1999 as the notification date, Brussels and Gillam's notice of May 31, 1999 was not given in a timely manner (C.sub 2, p. 42).

According to Valvision, the definition of "Business Days" in the General Agreement ("any day on which banks are open for business in Paris") implies that Saturdays must be counted in the computation because it is a well-known fact that banks in Paris are open on Saturdays.

The 20th Business Day after April 29, 1999 is May 27, 1999 and not May 31, 1999. A computation of the period including Saturday May 15, 1999 and Saturday May 22, 1999 (the 2 Saturdays in the period which are not official holidays in France) is presented in Exhibits C.92 and C.91.

Even Mr. Stumphius, Vision N.V.'s counsel for the sale, in his letter of May 19, 1999 has accepted Valvision's position.

60. Vision N.V. and Vision B.V. argue that the pre-emption notices were duly delivered within the 20 Business Day period on May 31, 1999 because, in Paris, banks are not open for commercial business on Saturday, which must be therefore excluded from the computation of the pre-emption delay. Some banks open some of their branches on Saturday but no business can be done on those days. On Saturday, one can only receive a cheque book, deposit a cheque but no scriptural payment transaction between banks can occur. The so-called "système interbancaire de paiement" is closed (R.49) (R.sub 2, p. 15).

In addition, Mr. Stumphius' letter is not decisive (p. 16), as the 20 Business Day period ends on Thursday May 27, 1999 whereas Mr. Stumphius' letter refers to

Friday May 28, 1999. Mr. Stumphius' letter could therefore not be considered as being an admission that the 20 Business Day pre-emption period would have ended on May 27, 1999. If he meant to say that, he obviously made an error.

61. In its reply, the Claimant maintains its position (C.sub 3, p. 13 and 14), as it is possible on Saturdays in Paris to deposit cheques, sign loan agreements, withdraw cash from a bank, meet the banker and negotiate credit lines. Furthermore, Decree no. 97-326 dated April 10, 1997 provides for the right to open bank branches on Saturdays, with the right for the employees having worked on Saturday to rest on Monday. In addition, a bank could initiate a wire transfer and a party could instruct a bank to wire funds on a Saturday but the execution of the transfer would merely be postponed until the first next opening day of the system.

In addition, time being of the essence in a pre-emption agreement, the time limit of 20 Business Days must be interpreted in a narrow sense as retaining Saturday as a Business Day.

62. The Respondents reply that the labour law regulations only show that some banks might open some of their branches on Saturday but that no business can be done on Saturday (R.sub 3, p. 10).

In addition, the time limit of 20 Business Day should not be interpreted in a narrow sense according to French law but should be interpreted in conformity with what the parties intended (Art. 1156 of the French Civil Code). In the case at hand, the parties to the General Agreement, the Minority Shareholders as well as Vision N.V., considered that Saturday was not to be regarded as a Business Day.

3. Considerations

1. The relevant regulations

63. French labour law distinguishes between "*jour ouvrable*" and "*jour ouvré*". A "*jour ouvrable*" is a day which may be legally worked and is usually translated into English as "business day", "workable day" or "working day", whereas a "*jour ouvré*" is a day actually and collectively worked in a given company and is most of the time translated as "worked day" or "day of work".

From a French labour law point of view, Saturday should be treated as a Business Day as the sole day during which work is prohibited is Sunday.

Moreover, at the time the General Agreement was entered into (in 1995), the organisation of the working hours in banks was governed by a decree of 1937, pursuant to which two consecutive days off per week were to be granted to

bank employees, including Sunday. As a result, there has never been any legal provision preventing the banks from being open on Saturdays.

64. Commission Regulation (EC) No. 447/98 of March 1, 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings provides the following definition of the term "working days":

> *"The expression "working days" in the Regulation means all days other than Saturdays, Sundays, public holidays and other holidays as determined by the Commission and published in the Official Journal of the European Communities before the beginning of each year."*

Although the EU legislator used the word "working days", it felt compelled to expressly exclude Saturdays from such term.

No clear determination may therefore be deduced from the above mentioned legal provisions.

2. Banking practice in Paris

65. It is not contested by the parties that at least some branches are open on Saturdays.

The parties do not differ either as to the type of activities that these open branches may perform on a Saturday: a wire transfer can not be performed but cheques can be deposited, loans asked for and obtained, cash withdrawn, meetings organised.

The Arbitral Tribunal must therefore identify what the intention of the parties was when they signed the General Agreement.

3. The wording of the clause

66. Pursuant to Article 1 of the General Agreement, a Business Day means any day on which banks are open for business in Paris (France).

It must first be pointed out that the parties have not excluded Saturdays from the Business Days, as they could contractually have done.

Furthermore, the use of the word "any" would not seem to support the view that only the days when the banks would be open to perform all operations that could be expected from a bank would count in the computation.

However, comparison must be made with Schedule D of the SPA where a Business Day is defined as any day on which the banks are open for business in

Amsterdam, The Netherlands and New York, USA. It is not disputed that no banks are open at all in New York on Saturdays.

4. The purpose of the clause

67. The General Agreement contains several references to the concept of Business Days.

For example, on page 12, §3 of the General Agreement, it is provided that the sale resulting from the exercise of the pre-emption right and the payment of the price shall take place within 10 Business Days following the exercise of that right.

On page 16, point 4.4.3., the General Agreement provides that the transfer of all the shares in case of a Put Option shall take place no later than 30 Business Days following the end of the month during which the pre-emption is exercisable.

In addition, on page 17, §1, the General Agreement provides that on the date of transfer of the shares, KPN shall pay to the Minority Shareholders the purchase price in cash upon delivery of the share transfer form.

The provisions reviewed above refer to payments that had to occur during a Business Day; it is therefore contractually required in order for the General Agreement to be effective that the definition given to the term "Business Day" allows international banking payments to take place.

It is not contested by the parties that international clearing cannot take place on a Saturday in Paris.

Saturdays therefore appear to have been excluded from the contractual definition of Business Days in the General Agreement.

5. The interpretation of the clause by the parties

68. The attitude of the parties after the signature of the contract and up until the time when the dispute arose could also be taken into account, as that attitude indicates how the parties themselves actually perceive the agreement in dispute.

This rule is sometimes referred to as "practical and quasi authentic interpretation" or "contemporary practical interpretation " and is commonly applied in arbitral case law (Fouchard, Gaillard, Goldman, On international commercial arbitration, 1999, page 258).

This evidential means is also enshrined in Dutch law, as the general rule of interpretation is that one has to seek what, in the given circumstances, the parties

could reasonably derive from each other's statements and behaviour with regard to each other's intentions (Bloembergen, van Dam, Hijma and Valk, Rechtshandeling en overeenkomst, Deventer 2001, p. 318-324, n°265-269; see also Hoge Raad 13 March 1981, NJ 1981, 635 (Haviltex)).

69. Reference in this respect has been made by Valvision to the letter sent by Mr. Stumphius to Alan Sugarman on May 19, 1999 (C.12), i.e. before the exercise of their pre-emption right by the Core Minority Shareholders and therefore before the dispute arose between the parties.

Mr. Stumphius acted on behalf of or represented Vision N.V. in the negotiation of the SPA, and his acts as a representative can therefore be considered as valid against his principal, Vision N.V.

The above-mentioned letter reads as follows:

> *"The Minority Shareholders have been notified on April 29, 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 May 28, 1999 (i.e. 20 Business Days after the Notification Date) [...]*

70. Vision N.V. and Vision B.V. argue that this letter could not be considered as decisive because Valvision alleges that the 20 Business Day period would end on Thursday May 27, 1999 whereas Mr. Stumphius refers to the date of Friday May 28, 1999.

Valvision argues that (C. sub 3, p. 28) if the Core Minority Shareholders were required to give notice of pre-emption on May 27 before midnight, then one would not know until 12.01 a.m. on May 28 whether a notice had been faxed in the middle of the previous night. Therefore, its computation would be the same as that of Mr Stumphius.

This could indeed be one of the possible explanations for Mr Stumphius' interpretation.

71. It could also, however, mean that Mr. Stumphius expected the deadline for the exercise of pre-emption rights to expire on May 28, 1999. The wording of Mr. Stumphius' letter may lead to this conclusion as he does not write that Vision N.V. will know on May 28, 1999 whether the Minority Shareholders have exercised their rights ("the previous night" being understood) but that their reaction can be expected on May 28 (i.e. that they could still send their letter on that day).

This date of Friday May 28, 1999 retained by Mr. Stumphius cannot be reconciled with a computation of the 20 Business Days in which Mr. Stumphius would not have taken into consideration the Saturdays, pursuant to Vision N.V. and Vision B.V.'s actual position (as Ascension Day and Pentecost Day are also

bank holidays in The Netherlands, Mr Stumphius would be unlikely to have forgotten them).

It could also not be reconciled with the computation of the 20 Business Days put forward by Valvision.

The arbitrators are therefore at a loss to understand what Mr. Stumphius might have meant or how he made this calculation.

The Arbitral Tribunal will therefore not give consideration to this letter, which does not support either position.

6. Conclusion

72. Based on the above considerations, the Arbitral Tribunal is of the opinion that Saturdays were not included in the Business Days as defined in the General Agreement.

Consequently, the pre-emption rights were exercised on time by the Core Minority Shareholders, i.e., within the deadline provided for in the General Agreement.

§4. COLLUSION

73. Valvision has argued that Vision N.V. and Vision B.V. colluded with the Core Minority Shareholders to share the additional profit obtained by the Core Minority Shareholders from the resale of the shares to Médiaréseaux and has devoted considerable length of memoranda and pleading time to the various contacts that had occurred between IntercommHolding, the Core Minority Shareholders and Vision N.V. and Vision B.V. around the time the SPA was signed.

Valvision has however failed to put forward sufficient evidence as to the existence of any sort of payment or so called "kickback" that would have been paid by the Core Minority Shareholders or would otherwise have benefited to Vision N.V. or Vision B.V.. The existence of a "kickback" has been denied by the counsel for Vision N.V. and Vision B.V. as well as by Mr. Van der Hoeven in his testimony (R.23).

The Arbitral Tribunal dismisses this allegation in the absence of evidence that Vision N.V. or Vision B.V. would have benefited from the higher purchase price that the Core Minority Shareholders were able to obtain from UPC.

§5. VISION N.V. AND VISION B.V.'S OBLIGATION TO PERFORM THE SPA IN GOOD FAITH

1. The position of the parties

74. Valvision argues that Vision N.V. and Vision B.V. breached their duty to perform the SPA in good faith because, by a secret letter of agreement dated June 17, 1999, Vision N.V. waived in favour of the Core Minority Shareholders the requirement provided for in the General Agreement that the exercise of the pre-emption right and the payment of the purchase price had to take place within 10 Business Days following the exercise of the right as well as the requirement under the SPA that the purchaser deposit a down payment with the escrow agent (C.sub.2, p. 42 to 46).

Valvision explained that the 10 Business Day period for the payment of the purchase price provided for in the General Agreement had to apply instead of the 55 days provided for under the SPA and that this 10 Business Day period was a mandatory essential condition.

75. Vision N.V. and Vision B.V. replied (R.sub.2, p. 18) that the Minority Shareholders did not have to pay the purchase price within the 10 Business Day period mentioned in Article 4.3.2b, §5 of the General Agreement because:

- the General Agreement itself provides for extension possibilities and exceptions (Article 4.3.2c);

- Article 4.3.2b, §3 provides that the exercise of the pre-emption right shall be made at the price and under the other terms and conditions mentioned in a notification by the withdrawing party (i.e. Valvision) and that, in other words, the 10 Business Day period for payment only applied in case the terms and conditions of the SPA did not provide for another term. In this case, Article 4 of the SPA provided for a 55-day period for paying the price;

- even if the Arbitral Tribunal would consider that the 10 Business Day period applied, the Core Minority Shareholders by not complying with it, did not waive their pre-emption right as Article 4.3.2b did not provide for any sanction, contrary to Article 4.3.2a (R.sub.2, p. 19);

- furthermore, Article 4.3.2a (i) of the General Agreement states that any exercise by the Core Minority Shareholders of their pre-emption right is irrevocable. In order words, if the Core Minority Shareholders did not complete the sale or pay the purchase price, Vision N.V. would have been entitled to force them to do so by a court order. However, if the Core Minority Shareholders had pre-empted but had not paid within the 10 Business Day period, pursuant to the Sciari case (Cass. fr., Chambre comm., June 1, 1993, R.D.I.), Valvision could not have obtained the annulment or the termination of the agreement with the Minority Shareholders for non compliance with the pay-

ment deadline, as the French Cour de cassation held that the period within which a sale of shares had to be completed could not be considered as mandatory as it was not explicitly stated that the sale would be annulled if the deadline was not complied with (R.sub.2, p. 19).

76. Valvision responded that the Sciari case supported its own argument that the obligation of good faith had to be considered when construing an agreement and that the parties to a contract could not modify a contract to prejudice a third party (C.sub.3, p. 7). Valvision argued that, regarding the interconnection between the General Agreement and the SPA, an agreement is a fact the existence of which has to be acknowledged by all.

For Valvision, the fact that Vision N.V. waived some requirements towards the Core Minority Shareholders, such as the down payment and the period for the closing, constitutes a breach of the SPA (C.sub.3, p. 10 to 13).

77. The Respondents finally submitted that the fact that the Core Minority Shareholders did not make a down payment could not in any way constitute a breach of the SPA entered into by Valvision and Vision N.V. because:

- there exists no obligation under French law according to which the Minority Shareholders should pre-empt under exactly the same terms and conditions as the purchaser;

- in any event, pursuant to Dutch law, one can only speak of breach for contract if a damage occurred which were directly connected with a failure to comply with an obligation under the contract. In the case at hand, there would be no connection between what Valvision considers to be the non-fulfilment of an obligation under the SPA and the damage it alleges.

78. On November 28, 2001, the Arbitral Tribunal invited the parties to comment on the conditions under which the pre-emption rights had been exercised, in particular with respect to the reimbursement made by Vision N.V. to the Core Minority Shareholders of an amount of FRF 800,000 in respect of certain severance payments made by RCF to Mr. Esgain.

79. In C.sub 5, Valvision submitted that as the actual severance payments made to Mr. Esgain substantially exceeded FRF 800,000 and that the June 17, 1999 side letter, by limiting the offset to FRF 800,000 (NLG 269,000), increased the consideration received by Vision N.V.: the pre-empting Core Minority Shareholders paid a purchase price greater than the purchase price that would have been paid by Valvision to Vision N.V. under the SPA. This increase in the net purchase price received by Vision N.V. constituted a variation of the terms and conditions of the SPA.

80. In R.sub 5, Vision N.V. and Vision B.V. argued that the amount of FRF 800,000 corresponded to the severance payment made to Mr. Esgain pursuant to Article 3.5 of the SPA. According to Vision N.V. and Vision B.V., Article 3.5 of the SPA does not provide that Vision N.V. was obliged to procure the termination of Mr. Esgain from RCF and to be responsible for the costs of the termination, but only obliged Vision N.V. to take into account "claims" made by Mr. Esgain; these claims did not cover the "indemnité conventionnelle de licenciement" resulting from the automatic application of the mathematical formula contained in the French labour law regulations but would exclusively relate to the additional compensation paid over and above the compensation due in any event by law.

Furthermore, Vision N.V. and Vision B.V. commented on the content of the various points of the letter of June 17, 1999 (R.21).

81. In C.sub 6, Valvision contested the interpretation made by Vision N.V. and Vision B.V. in R.sub 5) of the word "claim" appearing in Article 3.5 of the SPA and requested the Tribunal to reject Vision N.V. and Vision B.V.'s newly submitted evidence because no witness with first-hand or even second-hand knowledge had been produced in relation to this evidence and it had not had the opportunity to question witnesses.

82. In R.sub 6, Vision N.V. and Vision B.V. maintained its interpretation of the word "claim", indicated that the French law firm Gide Loyrette Nouel had drafted the settlement agreement with Mr. Esgain and offered the testimony of the lawyers who had participated in the drafting.

83. In C.sub 7, Valvision argued that the letter of June 17, 1999 (R.21) altered the provision of the SPA by making the payment by the seller, in the form of an offset, a condition for the sale of the RCF shares whereas Article 3.5 of the SPA constituted a mere covenant.

Valvision requested furthermore that no more evidence be submitted and left it to the Arbitral Tribunal to draw appropriate inferences from the "concealments and obfuscations" allegedly made by Vision N.V. and Vision B.V.

84. In R.sub 7, Vision N.V. and Vision B.V. contested the assertion that the June 17, 1999 side letter would alter the provisions of the SPA, explaining that the clause relating to the dismissal of Mr. Esgain was not a condition for the sale but the mere application of the provisions of Article 3.5 to the existing situation.

85. During the hearings, Vision N.V. and Vision B.V. argued that, on June 17, 1999, Vision N.V. and the Core Minority Shareholders were contractually bound and had worked out simply the practical completion of the deal. This is said to be the context of the side letter of June 17, 1999. It was entered into well after

the date on which a definite, firm and irrevocable contractual link had been established between Vision N.V. and the Core Minority Shareholders. At that time, the deal was done and the parties were then considering how, in practical terms, to implement the deal (Tr. 10/7/2001, p. 54 and 55).

The position developed by Vision N.V. and Vision B.V. is that the sale to the Core Minority Shareholders was complete as from the day the Core Minority Shareholders had exercised their rights, i.e. on May 31, 1999 and could therefore in no event still take place to the benefit of Valvision, as the contract entered into between Vision N.V. and Valvision in April 1999 had terminated. Vision N.V. was therefore free of its obligations towards Valvision and was at liberty to grant to the Core Minority Shareholders different conditions allowing the implementation and the completion of the sale of the shares that had been pre-empted, without violating the rights of Valvision. Consequently, no breach of contract could be held against Vision N.V. or Vision B.V. because of the facilities granted by Vision N.V. to the Core Minority Shareholders, as the practical aspects of the exercise of the pre-emption rights would only concern the parties to the sale, i.e. Vision N.V. and the Core Minority Shareholders.

86. The Arbitral Tribunal will review in detail the sequence of facts of the period following the exercise by the Core Minority Shareholders of their pre-emption rights, will analyse the content of the letter of June 17, 1999 and will determine whether or not Vision N.V. or Vision B.V. have breached their obligation to perform the SPA in good faith.

2. Detailed sequence of the facts

87. The sequence of the facts as from the exercise by the Core Minority Shareholders of their pre-emption rights can be detailed as follows:

- May 31, 1999: the Core Minority Shareholders give notice of the exercise of their pre-emption rights (C.13);

  No down payment occurs: Valvision argues that Brussels and Gillam, as pre-empting shareholders, should have made the 10% down payment on or about the date of the notice of pre-emption as required by the SPA, Article 3.1;

- June 2, 1999: RCF holds a Comité d'Entreprise meeting chaired by Mr. Moineville informing RCF's personnel that UPC has become the new shareholder (C.16);

  > *"Consultation du Comité d'Entreprise sur l'entrée d'un nouvel investisseur dans le capital de RCF.*
  >
  > *Bruno Moineville explique que le groupe UPC est en train de réaliser le projet initialement envisagé par Vision Networks N.V.*

UPC se développe rapidement en Europe et s'est introduit en Bourse, à Amsterdam et New York en Février 1999.

Bruno Moineville présente l'approche commerciale du groupe UPC qui se caractérise par une approche multiservices et une pratique de prix agressifs.

Suite aux différents rachats de UPC, il existera une véritable complémentarité géographique. En effet, UPC sera présent en France :

- *dans le Rhône à travers les réseaux Rhône Vision Câble,*
- *dans la région parisienne à travers les réseaux de Médiaréseaux,*
- *dans l'ouest par Limoges, à travers les réseaux de Citéréseau,*
- *ainsi que dans le nord avec Valenciennes et dans le sud avec Antibes.*

Les objectifs du groupe UPC seront les suivants :

- *mettre à niveau les réseaux RCF pour les faire passer en HFC bidirectionnels propres à distribuer TV, Internet et Téléphonie,*
- *amener rapidement la nouvelle entité à la rentabilité."*

- June 2, 1999: Mr. Stumphius writes to Mr. Sugarman informing him that the Core Minority Shareholders have exercised their pre-emption rights under the General Agreement relating to RCF. Once the purchase and transfer (and payment) is completed (but not before), the SPA will terminate automatically pursuant to article 3.3.2. of the SPA, the down payment being returned to Valvision (C.15);

- June 7, 1999: Médiaréseaux, a subsidiary of UPC, signs an agreement purchasing 95.763% of the shares of RCF from Brussels and Gillam contingent upon Brussels and Gillam purchasing the shares from Vision N.V. A down payment deposit is made by UPC (C.17);

- June 14, 1999: Mr. Sugarman asks Mr. Stumphius when Valvision's escrowed funds will be released, indicating that Valvision would like to receive these funds at the earliest possible moment (C.19);

- June 15, 1999: Mr. Sugarman, counsel for Valvision, writes to Mr. Stumphius, counsel for Vision N.V., requesting that the escrow funds be immediately wired back but, more importantly, draws the attention of Vision N.V. to the following (C.20):

  "we expect that your client's obligation to use its best efforts to deliver the French shares to my client would require that your

client not provide any extension or waivers to the Minority Shareholders under your client's contract with them";

- June 17, 1999: Mr. Sugarman writes to Mr. Stumphius again along the same lines, reiterating that (C.21):

> *"We are also troubled by the fact that Mr. Behar and you are continuing to dodge our questions about what additional consideration was offered by the Minority Shareholders as to induce your client to violate our agreement by your client providing the Minority Shareholders with more than 10 days to complete the purchase.*
>
> *Not only is that a violation of our contract including the requirement of good faith but it would appear that any such offer by the Minority Shareholders would be a tortious interference of our contract to purchase the shares, and we will so advise the Minority Shareholders. Moreover, if such a tortious interference did occur, then our claim against them would not be subject to the arbitration proceedings."*

- June 17/18, 1999: the Sale and Purchase Agreement is entered into between Brussels and Gillam as buyers and Vision N.V. as seller (the "SPA Core Minority Shareholders") (R.22);

- June 17, 1999: on the same day, Vision N.V., Brussels and Gillam enter into an agreement pursuant to which the parties agree to waive some of their respective rights and to deviate from certain provisions in the SPA Core Minority Shareholders (R.21);

- June 23, 1999: Mr. Stumphius writes to Mr. Sugarman indicating that the down payment is only returnable once the Core Minority Shareholders have completed the pre-emption of the shares, i.e. the transfer of shares and payment therefor (C.26);

- June 29, 1999: the RCF shares are transferred by Vision N.V. to Brussels and Gillam;

- June 30, 1999: Brussels and Gillam transfer the RCF shares to Médiaréseaux.

3. The nature of the obligation to perform the SPA in good faith

88. Valvision and Vision N.V. entered into the SPA that related to the sale of the RCF shares by Vision N.V. to Valvision. They had agreed upon all the conditions of their transaction but Vision N.V. was under the obligation to comply with pre-emption rights it had granted to the Minority Shareholders of RCF pursuant to the General Agreement. Vision N.V. and Valvision therefore had to respect the consequences of the existence of the General Agreement. The SPA specifically provided for the respecting by Vision N.V. of its obligations under

the General Agreement and, more specifically, of those relating to the exercise of the pre-emption rights by the Minority Shareholders.

Vision N.V. therefore had to comply with the notification requirements provided for by the General Agreement and had to allow the Minority Shareholders to exercise the rights recognised by that agreement.

However, Vision N.V. remained during the same period of time bound by its obligations towards Valvision arising out of the SPA. Pursuant to Dutch law, the law applicable to the contract, Vision N.V. had to perform the SPA in good faith.

In order for Vision N.V. to perform the SPA in good faith towards Valvision, Vision N.V. was under the obligation to implement the pre-emption rights it had granted to the Minority Shareholders in such a way as to match Valvision's legitimate expectations.

Indeed, Article 3.3.1 of the SPA specifically refers to Vision N.V.'s obligation to give the Minority Shareholders the opportunity to exercise the pre-emption rights granted to them pursuant to Article 4.3.1 of the General Agreement.

Valvision was informed, not only of the existence of such General Agreement which was valid as against it, but also of the content of its Article 4.3.1 and therefore of the conditions under which the pre-emption rights were supposed to be exercised.

Valvision therefore had the legitimate expectation that, were the pre-emption rights to be exercised, they would be exercised in the way they were supposed to pursuant to the relevant contractual provisions.

Vision N.V. was therefore under the obligation towards Valvision, to ensure that the conditions of exercise of the pre-emption rights would be strictly complied with.

More specifically, Vision N.V. could not in any way facilitate the exercise by the Minority Shareholders of their pre-emption rights under the General Agreement, as it ran the risk of making the performance of the SPA impossible or more difficult than initially foreseen, and therefore of violating its obligations to perform it in good faith towards Valvision.

89. It must therefore be determined under which conditions the pre-emption rights had to be performed by Vision N.V. and the Core Minority Shareholders in order not to frustrate Valvision from its legitimate expectations.

90. Valvision has argued that any derogation or deviation granted to the Minority Shareholders by Vision N.V. would constitute a breach of the SPA. Valvision has indeed argued (page 40, C.sub 2):

- that the pre-emption rights provide the beneficiary with a simple preferential right, a purchase priority, and that the pre-emptor holds the same rights and finds itself under the same conditions as the original buyer;

- under French law, pre-emption rights are to be interpreted narrowly. Because of the nature of the pre-emption right, the pre-emptor must comply with the terms of the agreement providing the right and must follow the same terms and conditions as those of the contract which defines the conditions of the sale of the shares of the withdrawing party. The pre-emption right places the pre-emptor in the very position of the chosen transferee: the pre-emptor must observe all conditions of the contract anticipated by the transferor and the chosen transferee. The pre-emption right is a simple preferential right, necessitating the fulfilment of conditions of the planned transfer (Malaurie et Aynès, Contrats spéciaux, Cujas 13e éd., n° 154; Deruppé, Dalloz Sociétés, Préemption, n° 50). The exercise of a pre-emption right does not necessarily require the drafting of a new instrument but results in the substitution of one person for another;

- as a result, the pre-emption may only be carried out under the terms and conditions of the proposed transfer, unless otherwise stipulated in the pre-emption agreement (C sub.2, p. 40 and 41);

- article 4.3.2.b, §3 of the General Agreement also provides that the exercise of the pre-emption right shall be made at the price and under the other terms and conditions mentioned in the notification made by the withdrawing party (i.e. Valvision).

91. Vision N.V. and Vision B.V. have however argued that there existed under French law no obligation according to which the Minority Shareholders should pre-empt under exactly the same terms and conditions as the purchaser (R sub 2, p. 23).

92. It is generally considered under French law that the conditions under which the pre-emption rights must be exercised are determined by the pre-emption clause itself.

In general, the pre-emption rights must be exercised at the price and under the other terms and conditions mentioned in the notification made by the withdrawing party.

Pursuant to the author quoted by Vision N.V. and Vision B.V. in R 47 (Ed. Francis Lefèbvre, Sociétés commerciales, 1990, p. 925), this is the solution which corresponds the best to the spirit of the pre-emption clauses. Indeed, the purpose of these clauses is to enable their beneficiaries to substitute themselves to the potential purchaser in all its obligations to which the latter has bound himself

towards the seller. (See also, Prat, Les pactes d'actionnaires relatifs au transfert de valeurs mobilières, Paris, Litec, 1992, p. 106).

However, as quoted by the same author, this is not a rule of public policy and the shareholders may agree that the pre-emption rights could be exercised under different conditions, for example when the beneficiary of the pre-emtion rights does not agree on the price. The clause may then provide for various mechanisms for the price determination (see also the references by Lefèbvre, *op. cit.*, p. 925; Prat, *op. cit.*, p. 107).

The solution therefore resides in the wording of the clause organising the exercise of the pre-emption right under the General Agreement.

Article 4.3.2.b, §3 of the General Agreement provides that

> *"If the Transfer contemplated by the Withdrawing Party is not a Complex Transaction, the exercise of the pre-emptive right shall be made at the price and under the other terms and conditions mentioned in the notification made by the Withdrawing Party".*

93. Pursuant to the Definitions in the General Agreement, a Complex Transation means any Transfer whereby the consideration is not to be paid fully in cash. The transfer to Valvision being paid fully in cash, it did not qualify as a Complex Transaction pursuant to the General Agreement.

The General Agreement was therefore unambiguous on this issue: there was no contractual possibility for the pre-empting Minority Shareholders to exercise their rights under different terms and conditions from those agreed upon with Valvision.

Considering the content of the General Agreement and of French law, Valvision had the legitimate expectation that the Minority Shareholders would exercise their pre-emption rights - should they decide to do so - under the same terms and conditions as those of the SPA.

By virtue of its obligation to act in good faith towards Valvision, Vision N.V. was therefore obliged to hold the Minority Shareholders to strict observance of such terms and conditions.

94. The Arbitral Tribunal will review the various elements invoked by Valvision to allege that Vision N.V. or Vision B.V. breached their obligation to perform the SPA in good faith, including the letter of agreement of June 17, 1999 and the various elements of the context in which this letter was issued.

4. Analysis of the letter of June 17, 1999

95. The Arbitral Tribunal will first review the content of the letter of June 17, 1999 before analysing the context in which it was signed (R.21).

The second paragraph of the letter indicates that the letter serves to confirm that the parties have agreed to waive their respective rights or deviate from certain provisions in the SPA Core Minority Shareholders. The waivers that have been granted by the parties are listed below.

1. Point 1 of the letter

96. Point 1 of the letter provides that each of the parties shall waive any and all of its rights with respect to the condition precedent contained in Schedule F under 4 of the SPA.

Schedule F under 4 provides that Valvision shall have received and forwarded to Vision N.V. within 21 days from the day of signing of the agreement (i.e. the SPA Core Minority Shareholders) a letter from or on behalf of the bank lenders confirming to the company (i.e. RCF) that these lenders agree to defer repayment of principal on the relevant loans at least until the first anniversary of completion of the SPA.

One of the conditions of the sale has therefore been modified and has facilitated the consummation of the sale as it removes from the purchaser the obligation to obtain further facilities from the banks.

2. Point 2 of the letter

97. Under point 2, the letter of June 17, 1999 provides that the terms and conditions contained in Article 6 of the SPA shall not apply to either of the parties and each of the parties waives its rights with respect to that provision.

Article 6 provides for a purchase price adjustment mechanism. A draft completion balance sheet had to be prepared by the purchaser's accountant and reviewed by the seller's accountant. The accountants together, or with a third party in case of disagreement, had to finally determine the completion balance sheet binding on the parties. Subject to the final determination of the completion balance sheet, the purchase price could be adjusted according to a formula described in Article 6.7. It appears from the detail of Article 6.7 that the purchase price adjustment could result in a payment from the seller to the purchaser or from the purchaser to the seller.

Consequently, by entering into provision no. 2 of the letter of June 17, 1999, Vision N.V. waived the possibility of requesting from the Core Minority Sharehold-

ers a price adjustment, which might have entitled it to receive a higher purchase price on the basis of the Completion Balance Sheet.

Vision N.V. and Vision B.V. admitted during the hearing that point 2 of the letter of June 17, 1999 entailed a modification of the conditions under which the sale was being transacted with the Minority Shareholders:

> *"That is the adjustment clause. The famous adjustment clause – both of the parties, sellers and buyers, did not need that clause. They were on a perfect understanding of the financial situation. The company had it in order to expedite the implementation of the sale."* (Tr. 10/7/2001, p. 55, line 47).

98. The Arbitral Tribunal is of the opinion that this modification might have had substantial consequences for the price. If this clause had been implemented between Valvision and Vision N.V., Valvision might have had to pay a price adjustment to Vision N.V. By waiving the application of Article 6.7, Vision removed from the Core Minority Shareholders the risk of having to pay a price adjustment later. Point 2 of the letter therefore placed the Minority Shareholders in a position that was potentially more favourable than that of Valvision: they did not bear an outstanding risk of having to pay a price adjustment later.

99. In R.sub 5, Vision N.V. and Vision B.V. indicated that the price adjustment could possibly only lead to a minor decrease in the price and that, in order to avoid time consuming and costly procedures with accountants after the date of closing, Vision N.V. and the Core Minority Shareholders had decided to waive the clause for mere practical reasons (page 11).

This assertion that the price adjustment would only have led to a minor decrease of the price is not evidenced by Vision N.V. and Vision B.V. and the Arbitral Tribunal therefore remains of the opinion that the waiver introduced by point 2 of the letter was a substantial modification of the obligations, potentially in favour of the Core Minority Shareholders.

3. Point 3 of the letter

100. Pursuant to point 3 of the letter of June 17, 1999, the seller shall reimburse to the purchaser an amount of FRF 800,000 in respect of certain severance payments made by RCF. This amount shall be set-off with the original purchase price. This waiver refers to the dismissal of Mr. Esgain, which had been requested by Valvision (Tr. 10/7/2001, page 56, line 37 and following).

101. In C.sub 5, Valvision outlined the fact that the pre-empting Core Minority Shareholders and Vision N.V. agreed to reduce the purchase price by FRF 800,000 as an offset to account for the obligation of Vision N.V. to pay for the severance costs from Mr. Esgain, whereas the actual severance payment to Mr.

Esgain substantially exceeded FRF 800,000. The Core Minority Shareholders therefore paid a purchase price greater than the purchase price that would have been paid by Valvision to Vision N.V. under the SPA.

Pursuant to R.20, the amounts paid to Mr. Esgain amounted to the following:

- FRF 71,333.33: salary April 1 to April 15, 1999;
- FRF 110,492: bonus for 1998;
- FRF 123,676.76: unused vacation time;
- FRF 856,000: contractual dismissal compensation;
- FRF 300,000: lump sum settlement for Mr. Esgain's claim for personal, moral and professional injury.

The severance amounts paid to Mr. Esgain, not including salary, vacation pay and bonus, therefore did not amount to FRF 800,000 but to FRF 1,156,000 (C.sub 5, page 6). Valvision concluded that Vision N.V. walked away with a windfall because it never had to fully pay the costs of severance of Mr. Esgain.

102. In R.sub 5, Vision N.V. and Vision B.V. argued that Article 3.5 of the SPA did not provide that Vision N.V. was obliged to bear the whole cost of the termination of Mr. Esgain but only that it had to bear the costs and expenses arising out of any claims made by Mr. Esgain; Vision N.V. therefore only had to take into account the additional compensation, paid over and above the "indemnité légale ou conventionnelle de licenciement" resulting from the automatic application of the law.

These damages amounted to FRF 800,000 being:

- FRF 300,000: "dommage moral";
- FRF 500,000: damages paid over and above the "indemnité conventionnelle".

103. In its subsequent submissions, Valvision has requested that the documents produced by Vision N.V. and Vision B.V. as enclosures to their R.sub 5 be set aside by the Arbitral Tribunal because Valvision had not had the opportunity to cross-examine witnesses in relation to these documents.

104. If the interpretation of the word "claim" put forward by Valvision were to be followed, it cannot be disputed that the severance costs from Mr. Esgain did not correspond to the amount of FRF 800,000 and that therefore the exercise of the pre-emption right by the Minority Shareholders did not occur under the same terms and conditions as those of the SPA and, more specifically, those provided for by Article 3.5.

Should Vision N.V. and Vision B.V.'s interpretation of the word "claim" be followed, the only amount which could be considered as "a cost and expense out of any claims made by Mr. Esgain" is the FRF 300,000 amount paid to Mr. Esgain expressly referred to in the settlement agreement as a definitive and all inclusive lump sum indemnity paid to compensate the personal and moral prejudice suffered by Mr. Esgain as well as the damage caused to his professional reputation.

All the other amounts paid to Mr. Esgain (monthly remuneration, bonus, vacation and contractual indemnity) would have been paid in any case. In particular, Vision N.V. and Vision B.V. indicate that the contractual indemnity paid to Mr. Esgain resulted from the provisions of his employment agreement. It indeed results from Article 9 of Mr. Esgain's employment contract that in case of termination of Mr. Esgain's employment contract pursuant to a decision of the employer, save in case of gross misconduct, during a six-year period following the signature of the agreement, Mr. Esgain would be granted an indemnity amounting to 1 year remuneration calculated on the basis of his average monthly remuneration during the 12 preceding months, not including profit sharing.

Accordingly, the contractual indemnity of FRF 500,000 and not only the indemnity provided for by the collective bargaining agreement was to be paid even in the absence of a "claim" from Mr. Esgain in case of termination of his employment contract (save in case of resignation or dismissal for gross misconduct).

The amount that should have been taken into account for the purpose of Article 3.5 of the SPA is FRF 300,000 and not FRF 800,000.

Point 3 of the letter of June 17, 1999 therefore contains a deviation from the terms and conditions of the SPA.

105. The decision reached on this issue by the Arbitral Tribunal does rely on the new evidence submitted by Vision N.V. and Vision B.V. together with R.sub 5.

The Arbitral Tribunal accepts the documents as evidence and rejects the request made by Valvision that witnesses be heard and cross-examined on these documents, as Valvision had the opportunity to review these documents and comment on them in writing.

In addition, the Arbitral Tribunal would like to stress the fact that, pursuant to Article 20 of the ICC Rules, the Arbitral Tribunal is free to use any means of evidence that it deems fit. The Arbitral Tribunal may therefore rely, to support its decisions, on documentary evidence, without the obligation to allow parties to cross-examine witnesses in relation to the documentary evidence submitted.

4. Point 4 of the letter

106. Pursuant to point 4 of the letter of June 17, 1999, Vision N.V. and the Core Minority Shareholders agreed to complete the deal as quickly as possible. However, it is foreseen that the completion shall at the latest take place on June 30, 1999. The purchaser guarantees to the seller the payment of the purchase price before or at the latest on June 30, 1999. Provided that the purchaser shall comply with the aforesaid obligation, the seller waives its right with respect to the requirement for the purchaser to make an earnest money deposit referred to in Article 3.2. of the SPA.

The Core Minority Shareholders and Vision N.V. therefore agreed to complete the sale at the latest on June 30, 1999 and Vision N.V. waived the request for a down payment.

107. These are significant deviations from:

- the requirement to close within 10 Business Days as provided for in the General Agreement;

- the requirement to provide for a 10% down payment, pursuant to Article 3.2 of the SPA.

It appears that these deviations were granted to the Core Minority Shareholders in order to allow them to acquire the shares without having to put forward any down payment before they were able to complete the sale with their own purchaser.

Vision N.V. has therefore facilitated the purchase of the shares by the Core Minority Shareholders.

It must be emphasised that the derogation from closing within 10 Business Days from the exercise of the pre-emption right was granted by Vision N.V. to the Minority Shareholders after the 10 Business Day period lapsed.

The granting of these waivers/deviations does not amount to fraud or collusion between Minority Shareholders and Vision N.V.; it does, however, clearly constitute bad faith performance of Vision N.V.'s obligations under the SPA.

5. Point 5 of the letter

108. Point 5 of the letter of June 17, 1999 provides that the payment by the purchaser of the purchase price shall between the parties be deemed to constitute a waiver of any and all of the rights of the purchaser with respect to the condition precedent contained in Schedule F under 2 and 3.

Schedule F under 2 and 3 provides as follows:

> *F.2: "Seller shall furnish Purchaser with an opinion of a French counsel, reasonably satisfactory to the Purchaser to the effect that under French law : all requisite French regulatory approvals have been obtained; upon completion of the actions required pursuant to Article 5, Purchaser shall be the owner of all the French shares and the minority shares that the Purchaser acquire; and there are no warrants, rights or other agreements which, if exercised, would dilute Purchaser's interest in RCF. Such opinion will substantially be in the form attached as Schedule 0".*
>
> *F.3: "There shall be no pending action, suit or proceeding, order, judgement or decree of any governmental authority that has the effect of restraining or prohibiting the consummation of the sale and transfer of the French shares and, if applicable, the Minority shares."*

These two issues constitute derogations and deviations from the SPA.

6. Point 6 of the letter

109. Point 6 of the letter of June 17, 1999 contains a special confidentiality clause:

> *"Notwithstanding Article 10 of the Agreement, the Parties acknowledge that the confidentiality of this Letter Agreement is of prime importance and that disclosure of any information herein or the existence hereof may result in substantial damage to either of the Parties. Accordingly, each of the Parties agrees not disclose any of this information to any third party. Within their respective organizations the Parties shall only disclose such information to such persons as is strictly necessary on a need to know basis and always under the condition that such person has accepted to keep the information confidential in the same manner."*

This is a particularly strict confidentiality clause, which derogates from the general secrecy clause contained in Article 10 of the SPA.

When asked about the reason for such a strong confidentiality clause to be inserted in the letter of agreement, Mr. Van der Hoeven did not provide any convincing answer. Indeed, he referred to the fact that he was not proud of the conditions under which he had sold to the Core Minority Shareholders (Tr. 10/7/2001, 57 lines 34 and 59; p. 56, lines 52 to 54). This may be so, but it does not explain the existence of the confidentiality clause in the letter of agreement. The conditions under which the Core Minority Shareholders had purchased, and which Mr. Van Der Hoeven might not have been proud of, were clearly apparent from the SPA Core Minority Shareholders, which was drafted on the same day, pursuant to which the ownership of the shares was transferred from Vision N.V. to the Core Minority Shareholders.

7. Conclusion

110. The Arbitral Tribunal is of the opinion that through the letter of June 17, 1999, Vision N.V. granted the Core Minority Shareholders deviations, some of which substantial, from the sales conditions of the SPA.

The deviations so granted must further be assessed within the framework in which they were issued.

5. The context of the letter of June 17, 1999

111. The intention of the Core Minority Shareholders to resell the RCF shares to Médiaréseaux was clear from day one. Indeed, on June 2, 1999, RCF held a comité d'entreprise meeting chaired by Mr. Moineville informing its personnel that UPC had become the new majority shareholder of RCF.

The communication to the employees had consequently already been made before Médiaréseaux signed the purchase agreement with Brussels and Gillam on June 7, 1999 and before Brussels and Gillam paid for the shares and received them from Vision N.V.

From then on, Vision N.V. granted the Core Minority Shareholders deviations from the sales conditions under the SPA, some of which clearly facilitated the purchase of the RCF shares by these Core Minority Shareholders.

112. It is relevant to note that the June 17, 1999 letter constitutes a separate agreement from the SPA Core Minority Shareholders, although entered into on the same day. One may wonder why two separate agreements were entered into, when the share purchase agreement signed on the same day could simply have been amended.

An explanation could be found in the extremely strict confidentiality clause appearing in the letter of June 17, 1999. It is said that confidentiality is of prime importance and that the disclosure of any information may result in substantial damage to either of the parties.

The reason why the disclosure of the contents of the letter could result in substantial damage to the parties may originate from the respective waivers that were granted by the parties to each other. This would appear to apply all the more so in the context of the letters sent by the counsel for Valvision to the counsel for Vision N.V. the days preceding and on the very day of entering into this letter of agreement (C.20 and C.21).

Indeed, on June 15, 1999, Mr. Sugarman put Vision N.V. on notice: Vision N.V. had to use its best efforts to deliver the French shares to Valvision and could therefore not provide any extensions or waivers to the Core Minority Shareholders (C.20).

He reiterated the same message on June 17, 1999 (C.21), drawing the attention of Vision N.V. to its obligation to perform the SPA in good faith and therefore not to provide the Core Minority Shareholders with more than 10 days to complete the purchase.

This letter of June 17, 1999 was entered into after Vision N.V. had been put on notice not to grant the Core Minority Shareholders waivers or derogations from the contractual provisions that applied to Valvision pursuant to the SPA. This is most probably the reason why the letter of June 17, 1999 contains such a strict confidentiality agreement. Its contents were not supposed to be revealed to Valvision.

113. Reference can also be made to the fact that Article 4.3 of the SPA was left blank in the SPA Core Minority Shareholders. This article reads as follows:

> *If a Party becomes aware of anything that may prevent a condition from being fulfilled, such Party shall immediately inform the other Party in writing and the Parties shall cooperate to the extent reasonably possible to ensure that the condition is fulfilled.*

One may wonder whether the omission of this clause could be explained by the fact that Vision N.V. had previously received the above-mentioned letters from Valvision.

114. It is only within the framework of the arbitral procedure, upon explicit request by Valvision that the letter of agreement of June 17, 1999 was produced.

Reference is also made to the declaration made by the counsel for Vision N.V. and Vision B.V. during the hearing of July 10, 2001 pursuant to which, although Vision N.V. and Vision B.V. had been resistant to the production of documents at the beginning of the procedure, Vision N.V. and Vision B.V. had later loyally accepted the order of the Arbitral Tribunal (Tr. 10/7/2001 at 3).

6. The contractual breach

115. As stated above, in order for Vision N.V. to perform its obligations under the SPA in good faith, Vision N.V. had to hold the Core Minority Shareholders to strict compliance with the conditions set by the General Agreement for the exercise of their pre-emption rights. In particular, Vision N.V. could not facilitate the exercise of the pre-emption rights by the Core Minority Shareholders by modifying or waiving some of the conditions set for the exercise of the pre-emption rights.

The seller may not, after having entered into the SPA, make an agreement with Core Minority Shareholders in order to deviate from the sales conditions under the SPA and to facilitate the exercise of their pre-emption rights. Should the seller do that, he would not perform the SPA in good faith.

116. Vision N.V. and Vision B.V. have argued that, on June 17, 1999, Vision N.V. and the Core Minority Shareholders were contractually bound and had worked out simply the practical completion of the deal. This would be the context of the side letter of June 17, 1999. It was entered well after the date on which a definite, firm and irrevocable contractual link had been established between Vision N.V. and the Core Minority Shareholders, i.e. May 31, 1999. At that time, the deal was done and the parties then considered how, in practical terms, to implement the deal (Tr. 10/7/2001, p. 54 and 55).

The position developed by Vision N.V. and Vision B.V. is that the sale to the Core Minority Shareholders was complete as from the day the Core Minority Shareholders had exercised their rights and could therefore in no event still take place to the benefit of Valvision, as the contract entered into between Vision N.V. and Valvision in April 1999 had terminated. Vision N.V. was therefore free of its obligations towards Valvision and had the possibility to grant to the Core Minority Shareholders different conditions allowing the implementation and the completion of the sale of the shares that had been pre-empted, without violating the rights of Valvision. Consequently, no breach of contract could be held against Vision N.V. because of the facilities that would have been granted by Vision N.V. to the Core Minority Shareholders, as the modalities of the exercise of the pre-emption rights would only concern the parties to the sale, i.e. Vision N.V. and the Core Minority Shareholders.

The Arbitral Tribunal disagrees with this view. Indeed, it results from the express terms of article 4.3.2 b §5 of the General Agreement that the parties to the General Agreement had specifically linked the effectiveness of the sale and transfer of ownership resulting therefrom to the payment of the price of the pre-empted shares within 10 Business Days following the exercise of the pre-emption right. Moreover, the Arbitral Tribunal is of the opinion that, according to article 3.3.2. of the SPA, the Minority Shareholders had not fully exercised their Minority rights as this term is defined in article 3.3.2 of the SPA, as long as the payment had not been made within the contractual deadline and, therefore, the SPA could not automatically terminate before payment had been made within such contractual deadline.

The Tribunal founds its reasoning on the very terms of article 3.3.2 of the SPA which provides that the purchaser acknowledges and agrees that:

> *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 anyone of them), this Agreement will terminate automatically with immediate effect (...).* (emphasis added)

It is thus unchallengeable that article 3.3.2 provides that the SPA remains valid until the payment of the shares by the Core Minority Shareholders, which, again, is in perfect line with the concept of effective sale given in article 4.3.2 b §5 of the General Agreement.

Such interpretation, which is consistent with the relevant articles of the SPA and the General Agreement has been confirmed by the letter addressed by Mr. Stumphius, counsel to Vision N.V., to Mr. Sugarman on June 2, 1999 (C.15):

> *"Once such purchase and transfer (and payment) is completed (but not before) the SPA will terminate automatically pursuant to article 3.3.2 of the SPA, the down payment being returned to Valvision.* (emphasis added)

Further evidence of such interpretation could be found in the explanations on clause 3.3.2 of the SPA given by Messrs Booysen and Stumphius in two letters concerning the repayment to Valvision of its escrow deposit (see C.21 and C.26).

Valvision was therefore legitimately entitled to consider that its contractual rights remained valid until the Core Minority Shareholders had duly performed their obligations under the General Agreement.

117. Under these circumstances, Vision N.V. and the Core Minority Shareholders were not free to organise the deal as they wished after the sole exercise of their pre-emption right by the Core Minority Shareholders. In particular, Vision N.V. could not invoke article 4.3.2 (c) of the General Agreement in order to extend the 10-Business Day deadline provided for in article 4.3.2 (b) for the closing of the deal and the payment of the shares by the Core Minority Shareholders.

Article 4.3.2 (c) provides that:

> *"All the time periods mentioned from a) to b) above may be extended, if need be, to allow the parties to obtain all approvals necessary for theTransfer of the Shares".*

This article allows Vision N.V. to extend the deadlines provided for the closing of pre-emption deal only in order to obtain the required authorisations. It does not appear from the file that the extension of the closing deadline granted by Vision N.V. to the Core Minority Shareholders was caused by the requirement imposed on the Core Minority Shareholders to obtain authorisations pursuant to article 4.3.2 (c).

Indeed, pursuant to the letter of June 17, 1999, point 1, the parties waive any and all of the rights with respect to the condition precedent contained in schedule F under 4, which precisely related to the condition of obtaining authorisations from their lenders.

118. The Arbitral Tribunal therefore concludes that, notwithstanding the exercise of their pre-emption rights by the Core Minority Shareholders on May 31, 1999, the SPA had not terminated and Valvision could still hope to become the owner of the RCF shares if the Core Minority Shareholders would not strictly

respect the pre-emption procedure (including the payment deadlines) leading to the sale of the shares in their favour.

The actions taken by Vision N.V. after the exercise of the pre-emption rights by the Core Minority Shareholders and before the payment of the purchase price are therefore relevant for the appraisal of Vision N.V.'s performance of the SPA.

119. The Arbitral Tribunal must therefore review whether Vision N.V. has not held the Minority Shareholders to the strict observance of the SPA conditions and also whether Vision N.V. would have unduly facilitated the exercise of the preemption rights by the Core Minority Shareholders.

As indicated above, in its letter of June 17, 1999, Vision N.V. waived some of the conditions foreseen in the General Agreement for the exercise by the Core Minority Shareholders of their Minority rights such as in particular the condition of making a down payment, or the obligation to make payment within 10 days of the exercise of the pre-emption rights or the possibility to make a purchase price adjustment.

The closing of the deal (i.e. the sale proper, which was defined in para. 5 of article 4.3.2.b of the General Agreement as including the exercise of the pre-emption right and the payment of the price within 10 days following the exercise of such right) had to take place within 10 Business Days of the exercise by the Core Minority Shareholders of their pre-emption rights, i.e. on June 14, 1999. In this respect, it is important to note that the fact that the payment had to be made for the exercise of the Minority rights to be deemed completed, was expressly recalled at article 3.3.2 of the SPA. Payment was therefore a contractual condition regarded by both parties as a necessary element in order to have the SPA terminated. In this context, any active interference by Vision N.V. with such condition is to be deemed a violation of article 3.3.2.

Vision N.V. and Vision B.V. argued that the Minority Shareholders had 55 days, as provided for in the SPA, to close and that in fact the above mentioned letter of June 17, 1999 shortened the period for closing.

The Arbitral Tribunal is nevertheless of the opinion that the Core Minority Shareholders were bound to respect the deadline provided for in the General Agreement for the closing (i.e. 10 Business Days) and not the deadline provided for in the SPA (i.e. 55 days); indeed this 55 day-period took into account the time needed for the exercise of the pre-emption rights by minority shareholders, which of course would not apply in case of a sale to the Core Minority Shareholders precisely within the framework of the exercise of such pre-emption rights.

In addition to deviating from the sales conditions of the SPA, the letter of June 17, 1999 therefore covers or ratifies a default committed by the Core Minority Shareholders, in order to allow them to resell to Médiaréseaux/UPC without bearing any risk, as the Core Minority Shareholders only paid Vision N.V. after having themselves received payment from Médiaréseaux.

Vision N.V. also allowed the Core Minority Shareholders to obtain a right on the shares without having to pay a deposit, although the Core Minority Shareholders had received a deposit from UPC. Such downpayment however appeared important as far as Valvision was concerned (see §48 and 49 above).

Vision N.V. agreed not to go through with the price adjustment procedure which could have ended up in increasing the Purchase Price, because it knew that the Core Minority Shareholders were immediately going to resell their shares to Médiaréseaux (see the announcement to the Comité d'Entreprise on June 2, 1999, C 16).

As to the argument that some of these conditions could be considered as not essential to the consent of the parties, the fact that Vision N.V. accepted that the Core Minority Shareholders purchased the shares without fulfilling the conditions that it had required Valvision to perform has clearly facilitated the purchase of these shares by the Core Minority Shareholders.

In addition, these derogations were granted after Vision N.V. had been put on notice by Valvision not to breach the SPA at least in two letters of June 15 and 17, 1999.

The Arbitral Tribunal is therefore of the opinion that Vision N.V. breached the SPA as it failed to perform it in good faith by granting to the Core Minority Shareholders waivers beyond the contractual provisions.

7. The intentional nature of the breach

120. The nature of the contractual breach committed by Vision N.V. needs to be ascertained.

Vision N.V. could not have been unaware that the strict application of the conditions of the pre-emption rights was of prime importance for Valvision. The letter sent on June 2, 1999 by Mr. Stumphius to Mr. Sugarman confirms that Vision N.V. was perfectly aware of the consequences that the completion or the non-completion of their Minority Rights (as defined in the SPA) by the Core Minority Shareholders could have on Valvision's rights, including the fact that payment within the contractual deadline was a necessary condition for the automatic termination of the SPA. (C.15).

In addition, on June 15, 1999, Mr. Sugarman had put Vision N.V. on notice: Vision N.V. had to use its best efforts to deliver the RCF shares to Valvision and could therefore not provide any extensions or waivers to the Core Minority Shareholders (C.20).

He reiterated the same message on June 17, 1999 (C.21), drawing the attention of Vision N.V. to its obligation to perform the SPA in good faith and therefore not to provide the Core Minority Shareholders with more than 10 days to complete the purchase.

As Valvision had notified Vision N.V. that it maintained its expectation to acquire the RCF shares if the pre-emption was not completed, Vision N.V. knew that by accepting that the Core Minority Shareholders do not comply strictly with the terms of the General Agreement, it would necessarily cause a damage to Valvision by preventing the SPA from becoming fully effective.

This specific notice to Valvision explains why Vision N.V. and the Core Minority Shareholders felt obliged to include in their letter of agreement of June 17, 1999 such a strong confidentiality clause as the one found in such document. The Arbitral Tribunal can only draw the conclusion that Vision N.V. and the Core Minority Shareholders did not want the modification of the purchase price and the extension of the deadline for the closing of the sale to be known by Valvision.

The Arbitral Tribunal therefore concludes that Vision N.V. committed an intentional breach of the SPA.

The responsibility of the Core Minority Shareholders in the breach of the SPA committed by Vision N.V. must also be underlined as they are the ones who requested the deviations from the SPA conditions and they are the ones who benefited from the resale of the RCF shares to Médiaréseaux.

§6. THE ASSIGNMENT OF THE PRE-EMPTION RIGHTS

121. Valvision has argued that Vision N.V. and Vision B.V. violated the provision forbidding the assignment of the pre-emption rights by allowing the Minority Shareholders to resell the RCF shares to Médiaréseaux immediately after having purchased them from Vision.

Considering the decision rendered by the Arbitral Tribunal on the violation of the obligation to perform the SPA in good faith, the Arbitral Tribunal does not need to and will not review this breach.

III. THE CAUSAL NEXUS

122. Vision N.V. and Vision B.V. argue that there is no causal nexus between the waivers they granted to the Core Minority Shareholders and the damage alleged by Valvision.

Even if no down payment had been made and the deal had not have closed within 10 Business Days, pursuant to French case law, Vision N.V. would not have been in a position to rescind the contract against the Core Minority Shareholders, because the defaults committed by the Core Minority Shareholders would not have been sufficient to justify the rescission of the contract. Vision N.V. and Vision B.V. refer to the Sciari case (Tr. 10/7/2001, at 59 and 60).

123. The Arbitral Tribunal is however of the opinion that the situation has to be appraised differently.

Under Dutch law, a causal nexus is established when the recognised breach constitutes a conditio sine qua non of the damage suffered.

124. It must therefore be evaluated whether Vision N.V.'s violation of its obligation to perform the SPA in good faith and in particular its article 3.3.2, by granting to the Core Minority Shareholders waivers of their obligations under the General Agreement, can be considered as a conditio sine qua non of the damage alleged by Valvision.

It has been established above that Vision N.V. had, on June 17, 1999, granted to the Core Minority Shareholders waivers and deviations from various obligations that they should have performed under the General Agreement. In particular and as indicated above, the sale, whose effectiveness, according to the relevant terms of article 4.3.2 b of the General Agreement, depended upon the exercise of the pre-emption right and the payment of the price within 10 Business Days following the exercise of such right, had not taken place and therefore the Core Minority Shareholders had not closed the deal in time and Vision N.V. had to grant them an additional grace period to do so.

Vision N.V. should rather have drawn the consequences of the fact that the Core Minority Shareholders had not closed within 10 Business Days after the exercise of their pre-emption rights and that therefore the sale had not taken place. Vision N.V. should have notified the Core Minority Shareholders that the contract was terminated and transferred the shares to Valvision. More precisely, on June 15, 1999, having acknowledged, based on the terms of the General Agreement, that the Core Minority Shareholders had not duly closed the deal, Vision N.V. should have transferred the shares to Valvision.

The same reasoning applies to the other established breaches.

The Arbitral Tribunal is of the opinion that the transfer of the shares to Valvision could not have been criticised by the Core Minority Shareholders before a French Court because they had failed to fulfil several of the conditions (such as, in particular, the payment of a down payment and of the purchase price for the shares within the allotted time frame) which, according to the terms of the General Agreement, were necessary elements to achieve the sale.

125. Valvision has not been able to purchase the RCF shares as a direct consequence of Vision N.V.'s specific acceptance that the Core Minority Shareholders make the payment for the shares after the 10 Business Days delay had expired, thereby allowing an irregular exercise of the pre-emption right. Again, should Vision N.V. have acted in good faith, it would have acknowledged the failure of the Core Minority Shareholders to comply with the conditions laid down in article 4.3.2 b of the General Agreement and then allowed the sale of the shares to Valvision to take place.

Consequently, if Vision N.V. had not committed contractual breaches in respect of its performance in good faith of the SPA, the sale of the shares would have occurred to the benefit of Valvision.

Based on the above, the causal nexus between the breaches committed by Vision N.V. and the damages suffered by Valvision is established.

IV. THE DAMAGES

§1. THE RELIEF REQUESTED BY VALVISION

126. In the Terms of Reference, Valvision indicated that its minimum damage amounted approximately to NLG 15,000,000, i.e. €6,806,700, being the difference between the price it would have paid and the price paid by Médiaréseaux to the Core Minority Shareholders.

In C.sub 2, Valvision requested that it be awarded damages in the amount of €67,200,000 (page 51).

In C.sub 3, in order to expedite proceedings, Valvision decided to modify the relief requested and requested damages in the amount of €15,000,000 even though it considered that its damages were greater and it reserved the right to pursue additional remedies.

In C.sub 4 Costs, Valvision requested the payment of:

- its arbitration costs and expenses in the amount of €1,295,033.19;
- the reimbursement of its advances to the ICC in the amount of $268,500;
- the costs claimed by CSFB in the amount of £35,467.50 for the production of evidence and hearing of witnesses.

§2. THE GENERAL PRINCIPLES APPLICABLE TO DAMAGES UNDER DUTCH LAW

127. Division 6.1.10 NBW contains general provisions regarding the content and extent of all legal obligations to compensation, the most important of which are compensation for breach of contract and compensation for a wrongful act.

It must be noted that Division 6.1.10 NBW is of a general nature and is only composed of a number of principles, leaving a great deal to be developed by case law and legal scholars.

128. The concept of "damage" refers to the factual drawback that is the result of the breach of contract or the wrongful act (Asser-Hartkamp, I, nr. 409). The damage that is to be compensated on the basis of a legal obligation to compensation comprises the pecuniary damage on the one hand and (possibly) other - i.e. moral - damage on the other hand, the latter only insofar as the law entitles the aggrieved party to claim compensation therefor (article 6:95 BW).

As for pecuniary damage, the law describes this damage by using the concepts of "suffered loss" (*damnum emergens*) and "lost profit" (*lucrum cessans*) (article 6:96 paragraph 1 NBW). Moreover, the reasonable costs in order to prevent or limit the damage that could be expected as a result of the event on which the liability is based, the reasonable costs for establishing damages and liability, and the reasonable costs for obtaining extra judicial relief regarding the two previously mentioned costs qualify for compensation too (article 6:96, paragraph 2, a to c, NBW).

129. Compensation, as a rule, is to be provided *in money*. However, the judge can, on request of the aggrieved party, award compensation in a form other than the payment of a sum of money (article 6:103 NBW). The performance of a legal act can fall under the scope of the aforementioned legal rule. The aim of this rule is to restore the aggrieved party as much as possible to the position it would have been in had the breach of contract or the wrongful act not occurred.

§3. THE CONTRACTUAL LIMITATIONS OF LIABILITY ARE NOT APPLICABLE

130. In R.sub 2, pages 36 and 37, Vision N.V. and Vision B.V. have argued that its liability was limited under the SPA, pursuant to Articles 9.7, 3.3.2 and 9.4 of the SPA.

The Arbitral Tribunal will review the potential application of these limitations of liability.

1. The principles applicable under Dutch law

131. Pursuant to Dutch law, the parties are free to agree in a way that differs from the legal rules regarding their liabilities (Hartkamp, Exoneratiebedingen, *T.P.R.*, 1988, p. 1208, n°3 and following).

However, the validity or the effectiveness of the exoneration clauses is limited on several grounds.

132. First, an exoneration clause can be declared null and void for breach of public decency in connection with damage that the debtor has caused inten-

tionally (Hartkamp, Verbintenissenrecht, Deel I, Deventer 2000, n°342; Kortmann, "Exoneratiebedingen", T.P.R. 1988, p. 1232, nr. 27 and the references made by these authors).

133. In addition, the debtor cannot claim the benefit of an exoneration clause if, by doing so, it would act against the requirement of reasonableness and fairness. The legal basis of the theory is to be found in Article 1374, §3, B.W. as well as in Article 6:248, §2 NBW, which provides that what is agreed upon will not be applicable if it is unacceptable in view of the requirement of reasonableness and fairness in the given circumstances. The principle that the contracting parties should act vis-à-vis one another according to these requirements implies that, although as a rule they are strictly bound by what has been agreed upon, the occurrence of certain circumstances can result in the agreement not being honoured (Hartkamp, *op.cit.*, n°345; Hartkamp, Verbintenissenrecht, Deel II, Deventer 2001, n°312-314a and n°318; Kortmann, "Exoneratiebedingen", T.P.R. 1988, p. 1235-1244, n°30-37).

The subsequent case law has considered that, because of the requirement that the obligations be performed in good faith, certain facts and circumstances may have the consequence that one of the parties may not call upon a contractual limitation of liability (Hartkamp, op.cit., 345).

The Dutch legislator however wishes the judge to apply the limiting effect of good faith in a restrictive way (Asser-Hartkamp II, nr. 314a; J.H. Nieuwenhuis, C.J.J.M. Stolker, W.L. Valk, Burgerlijk Wetboek - Tekst en Commentaar, Deventer, Kluwer, 2001 (hereinafter: Nieuwenhuis, Stolker and Valk), p. 2034, no. 4).

In the jurisprudence of the Hoge Raad, the theory of reasonableness and fairness was transposed to exoneration clauses:

- In the decision of May 19, 1967, in Saladin vs. Hollandse Bankunie (NJ 1967, 261), the Hoge Raad ruled that the question as to whether an exoneration clause can be invoked or can not depend on various circumstances:

  > *"The answer to the question in which cases a person - in this case a bank - cannot invoke a clause in which it has excluded its liability for certain acts, even if these are of an illicit nature vis-à-vis the other contracting party can depend on the appraisal of various circumstances, such as: the severity of the fault, also in relation to the nature and seriousness of the interests that are at stake, the nature and further content of the agreement of which the clause is part, the social position and the mutual relationship between parties, the way in which the clause came into being, the degree to which the other contracting party was aware of the purport of the clause."*

- It has to be noted that in this decision a breach of good faith (in the words of the NBW: "the requirements of reasonableness and fairness") is not mentioned explicitly. This reference was made for the first time in the decision of

the Hoge Raad of February 20, 1976 (NJ 1976, 486, with note G.J.S.), *in Van der Laan vs. Top's Pluimveebedrijf*. In the aforementioned decision, the Hoge Raad ruled explicitly that "in relation to the requirements of good faith" certain facts and circumstances could result in the impossibility for the vendor of invoking the exclusion or limitation of its liability. The answer to the question whether this is the case depends, in the opinion of the Hoge Raad, on the appraisal of various circumstances (cf. the ruling of the Hoge Raad in *Saladin vs. Hollandse Bankunie* - see above), such as the severity of the fault on the part of the vendor, the nature and seriousness of the foreseeable damage, the way in which the clause came into being, the purport of the clause (i.e. in how far, in the exoneration clause, the limitation of liability agreed upon is in any relation to the amount of the foreseeable damages), the attitude of the buyer with regard to the defects or the damage caused by these defects.

See also

- Hoge Raad, December 12, 1997 (NJ 1998, 208), *in Gemeente Stein vs. Steiner Zand- en Grindhandel Driessen B.V.*,

- Hoge Raad, February 11, 2000 (NJ 2000, 194), *in Dijkstra vs. Batstra-Boven*,

- Hoge Raad, May 12, 2000 (NJ 2000, 412), *in Interpolis Schade N.V. & Van den Heuvel vs. Peeten B.V.*

The case law mentioned above illustrates (inter alia) that it is well established in the jurisprudence of the Hoge Raad that the judge in procedure on the merits, when dealing with the question of whether or not a clause in general conditions is a breach of reasonableness and fairness, may not render a judgment in general terms, but has to take into account all (as a rule relevant) arguments that are invoked in support of the position of the parties (see conclusion Hartkamp sub HR May 12, 2000, cited above and the jurisprudence cited by that author).

134. Finally it has to be noted that the use of the theory of "reasonableness and fairness" in theory supposes a preliminary review against the criterion of public decency. Only if it is certain that the clause has survived such review, should the use of the aforementioned theory be possible. In practice however, distinguishing between the two is quite useless, since the public decency review is almost entirely made obsolete by the review against the criterion of reasonableness and fairness.

2. Application of the principles to the case at hand

135. The Arbitral Tribunal is of the opinion that the exoneration clauses as evoked by Vision N.V. and Vision B.V. may not apply in this case for two reasons:

- as stated above (§120), the breach committed by Vision N.V. was an intentional breach of contract. According to the principles stated in Dutch law, a debtor cannot exclude or limit his liability for damages that were caused by him intentionally;

- in addition, Vision N.V. could not invoke any exoneration clause because of the requirement of reasonableness and fairness, as it has been established above that Vision N.V. has breached its duty to perform in good faith its obligation under the SPA.

§4. GENERAL PRINCIPLES APPLICABLE TO THE CALCULATION OF DAMAGES

1. Estimation of damage

136. The determination of the amount of damage usually has to be done by means of an evaluation. The amount of damage in this case is determined by means of a comparison of the actual situation with the situation that would presumably have existed if the harmful event had not taken place (J. Hijma and M.M. Olthof, *Nederlands vermogensrecht - Leidraad voor het nieuwe BW*, Deventer, Kluwer, 1999, no. 365a).

In complex cases, it can be useful or even necessary to calculate the total amount of damage by dividing it into a number of separate loss items. The distinction between suffered loss and lost profit (see above, §128) is in itself an example of such a distinction, but often a further distinction is needed.

137. The main principles in Dutch law regarding compensation are that (a) the actual damage has to be compensated for, and (b) that this damage as a rule must be fully compensated for.

It should be clear that a precise calculation of the damage suffered is not always easy. As an illustration, reference can be made to lost profit, with regard to which one will nearly always have to rely on a calculation based on probability (Asser-Hartkamp, I, nr. 420).

The amount of the damage will often have to be assessed. It is against this backdrop that one must look at article 6:97 NBW, in which it is provided that *"the judge determines the damage in the way that corresponds best with the nature thereof and if necessary can make an assessment"*. This rule of law aims at expressing the fact that the judge has considerable freedom not only in determining the amount of the compensation but also in answering the preliminary questions of whether or not the damage can be determined in a precise way and which criteria have to be used in determining the damage. This rule however does not impair the main principle of full compensation (Nieuwenhuis Stolker and Valk, p. 1760, no. 1).

2. The abstract method

138. This theory of the calculation of the actual damage is in some specific cases pushed aside in favour of the so-called "abstract" calculation of damage (as opposed to the actual or subjective calculation of damage). In several cases the Hoge Raad has ruled that the determination of damage had to be done on the basis of objective criteria. Article 6:97 NBW aims (*inter alia*) at providing a legal basis for this means of determining the damage, since it gives the judge the freedom to use this method, as long as it is in accordance with the nature of the damage (Nieuwenhuis, Stolker and Valk, p. 1760, no. 2).

When using this abstract method, the judge does not so much take into account the particulars of the case at hand and the subjective circumstances in which the aggrieved party finds itself, but tries to find out how large, in general, the amount of damage is that would be suffered by a creditor who is in a similar position as the aggrieved party. The damage is then equated with the decrease - calculated in an objective manner - in the property of the aggrieved party (Asser-Hartkamp I, nr. 417).

Thus, the question arises as to how the compensation should be calculated when the vendor sells goods that have a market price or a daily price and does not fulfill its obligation to deliver, and the buyer subsequently files a claim to rescind the sale. The Hoge Raad has ruled that in such a case the damage suffered by the buyer is to be calculated on the basis of the market price *at the time of the occurrence of the negligence*. If the market price at that time is higher than the price agreed upon, the buyer can claim as compensation the difference between the aforementioned market price and the price agreed upon (see for instance HR November 18, 1937, NJ 1938, 269; HR March 6, 1998, NJ 1998, 422 confirming that at present this hypothesis is explicitly regulated in articles 7:36 and 7:38 NBW). This means of determining the damage was first used in the field of sale agreements, but has made its way into other fields (such as property damage) too.

This method of calculation has the obvious advantage of being functional, while in most cases it produces reasonable effects. However, the objection has been raised that it is difficult to bring this method into line with the main principle that the actual damage should be compensated.

Indeed, the damage that is calculated in this way is considered as a minimum amount (Hijma and Olthof, op.cit., no. 392a). If the creditor can prove that the damage suffered is higher than the objective damage, it is entitled to claim the actual damage, i.e. the damage calculated in a subjective manner (see HR April 12, 1991, NJ 1991, 434: "*the compensation shall at least amount to* ..."). This point of view implies that the creditor has the choice between the abstract and the subjective way of determining the damage, and even that it can use the abstract method vis-à-vis certain loss items and the subjective method vis-à-vis other items. It should be noted that only the creditor - and not the debtor - has this option.

The most important cases in which the abstract method can be used are, without any doubt, compensation for damage or loss of property and compensation for breach of a (specific) sale agreement (see the rulings of the Hoge Raad cited above), in the form of general non-performance or the delivery of defective goods.

139. On the other hand, the Hoge Raad has ruled on several occasions, in the course of the past three decades, that the abstract method could not be used (for an overview, see Nieuwenhuis, Stolker en Valk, p. 1761, no. 2b; Asser-Hartkamp, I, no. 418). Reference should be made to: HR January 28, 1977 (NJ 1978, 174): if, in case of a breach of contract regarding a sale agreement, the loss of profit originated in a way other than from the difference between the daily price and the price agreed upon. In this particular case, a farmer had bought 10,000 kilograms of seed potatoes ("bintje") from a merchant. However, these potatoes had been treated with a product slowing down their germinative power, as is often used on potatoes for consumption. As a result, the potatoes did not germinate. The Hoge Raad ruled that if a vendor of goods that are only identifiable by their sort is *liable for non-performance by delivering goods of an inferior quality*, the damage suffered by the buyer will in general be the difference between the value, at the time of the non-performance, of the goods to be delivered and the value of the delivered (inferior) goods. The value of the goods will usually be the market value at the time of the non-performance or, if the buyer - in order to replace the delivered, inferior goods - reasonably can only buy the same quantity of goods later and at a higher price, the value identifiable at that time. However, the Hoge Raad ruled that this (abstract) method of calculation of damage was not applicable in that case, since the damage for which compensation was claimed was not a difference in value as mentioned above, but the loss of profit originating in the failure of the potato harvest, damage that, incidentally, was limited by the subsequent use of the ground for the cultivation of beans.

In other cases as well, the Hoge Raad has decided that the abstract method was not applicable but in circumstances totally different from the present one (HR March 23, 1979 (NJ 1979, 482); HR September 25, 1981 (NJ 1982, 255); HR September 20, 1985 (NJ 1986, 211); HR April 18, 1986 (NJ 1986, 567); HR April 3, 1992 (NJ 1992, 396); HR June 6, 1997 (NJ 1997, 612); HR September 18, 1998 (NJ 1999, 69).

Asser-Hartkamp (ibid.) argues that all these rulings show that the case law of the Hoge Raad, in his view rightly, only gives the choice to the aggrieved party in a limited number of cases to decide whether the damage it suffered should be determined by using the abstract or the subjective method. Moreover, A.R.B. (no. 1, h) - in his note under HR January 28, 1977 (see above) - argues that the freedom of choice for the aggrieved party can have a "boomerang"-effect if it chooses a certain method of calculation that, in the end, turns out to be unprofitable. If this is the case, the judge/arbitrator cannot switch *ex officio* to a more profitable method of calculation. The aggrieved party can avoid this either by filing an alternative claim in which both methods of calculation of damage are

presented together to the judge/arbitrator, or (possibly) by changing its claim in the course of the proceedings.

§5. THE CALCULATION OF DAMAGES FOR BREACH OF CONTRACT BY VISION N.V.

1. The abstract method

140. In C.sub 2, page 46, Valvision has requested the calculation of its damages on the basis of the abstract method.

As indicated above, §138 and 139, the arbitrator cannot switch ex officio to a more profitable method of calculation but must review whether this method can be applied in the circumstances of the case.

The potato harvest case could not be invoked by Vision N.V. and Vision B.V. in order to set aside the calculation of the damages on the basis of the abstract method. Indeed, Valvision has explicitly indicated that it does not claim compensation for the actual damage based on loss of profit (C.sub 2, page 48 and following) but rather claims compensation on the basis of the difference in value between the market price at the time of the occurrence of the negligence and the price agreed upon.

Vision N.V. and Vision B.V. argue that the abstract method could not be applied because the market price would be the price on the day of the alleged non-performance, which would not exist in this case and no reference could be made to market events that took place after the day of the alleged non-performance (R.sub 2, page 38).

141. The Arbitral Tribunal is of the opinion that in this case, the market price can be determined very precisely by the price at which Médiaréseaux had bought the RCF shares.

Indeed, the non-performance of its obligations by Vision N.V. took place in June 1999, and more specifically on June 17, 1999 when it granted the waivers and deviations that have been reviewed above under §95 and following.

At the time, the Core Minority Shareholders had already entered into an agreement with Médiaréseaux on June 7, 1999 in order to sell to Médiaréseaux 95.763% of the share capital of RCF (C.17). The purchase price was agreed upon on June 7, 1999 and paid on June 29, 1999.

The market price on June 17, 1999 could therefore be assessed perfectly on the basis of the price agreed between the Core Minority Shareholders and Médiaréseaux in their June 7, 1999 agreement that they concluded before the end of June 1999.

The application of the abstract method is therefore possible given the existence of a market price for the assets in question and for the precise period in question.

The Arbitral Tribunal wishes also to stress the fact that the abstract method of calculating damages is considered under Dutch law by the commentators and case law as being the minimum damages that could be claimed by the aggrieved party.

142. Valvision has requested that the abstract method of calculation of the damages be applied taking into account the average value of cable acquisitions in France and Europe in 1999-2000 that it evaluated at €1,695 per subscriber, which led to a request in payment of damages of €67.2 million. Later on, Valvision reduced its claim to €15,000,000 but without indicating on the basis of which market price this amount was calculated.

The Arbitral Tribunal may not take into account an average price per subscriber as stated in the documents submitted by Valvision as that would not correspond to the market price applicable in June 1999 for these specific RCF shares.

The only reference point that the Arbitral Tribunal can use in order to determine precisely the market price for RCF shares in June 1999, is the price paid by Médiaréseaux to the Core Minority Shareholders for the very same shares at that time.

2. The calculation of the amount of damages due by Vision N.V. for breach of contract

143. The amount of the damages due to Valvision must therefore be calculated on the basis of the difference between the price that Valvision had agreed to pay and the price that Médiaréseaux had agreed to pay.

Pursuant to Article 2.2 of the SPA, the total purchase price for the French shares was NLG 29,612,541 for 73.775% of the issued and outstanding share capital of RCF.

Pursuant to Article 2.2 of the SPA Core Minority Shareholders, the total purchase price of the shares was fixed at FRF 172,372,851 for 95.763% of the issued and outstanding shares of RCF.

The calculation of the damages is therefore as follows:

- SPA Purchase price = NLG 29,612,541 for 73.775% RCF = €13,437,585.27 (at the official conversion rate of 2,20371 NLG for 1€)
- SPA Minority Shareholders purchase price = FRF 172,372,851 for 95.763% RCF = €26,278,071.73 (at the official conversion rate of 6.55957 FRF for 1€)

- Proportion of Médiaréseaux' purchase price for 73.775% RCF (as calculated by the Arbitral Tribunal) =

$$\frac{€\ 26{,}278{,}071.73 \times 73{,}775}{95{,}763} = €\ 20{,}244{,}402.98$$

- Abstract damages = €20,244,402.98 - €13,437,585.27 = €6,806,817.71

3. Interest

144. The Claimant has not requested the application of any interest to the claimed amount.

§6. THE COSTS OF THE ARBITRATION

1. Arbitration fees

145. In C.sub 4 Costs, Valvision requested the payment of $268,500 advanced by Valvision to the ICC.

This amount of advances was the result of the claims sequentially filed by Valvision:

- On October 27, 1999, the ICC fixed the advances required by the parties at $135,000, on the basis of the initial amount of the claim filed by Valvision, i.e. €6,800,000. Both sides paid their share in the advance;

- On April 12, 2001, considering the new claim introduced by Valvision amounting to €67,000,000, the ICC fixed the advance at $540,000, to be paid equally by both parties;

- Vision N.V. and Vision B.V. refused to pay their share of the advance and Valvision was therefore requested to pay $405,000;

- On June 15, 2001, taking into account the reduced amount of the claim filed by Valvision (€15,000,000), the secretariat of the ICC reduced the amount of advances it requested to $336,000, Valvision being requested to pay $201,000;

- As a consequence, Valvision advanced $268,500 and Vision $67,500.

146. The Arbitral Tribunal is of the opinion that Valvision is entitled to 100% of the ICC arbitration costs (including the costs of the court reporters and the various expenses) as they had been calculated on the basis of Valvision's initial claim. Indeed, the amount of €67,000,000 claimed by Valvision was manifestly

unreasonable and no justification was ever given for the subsequently reduced amount of €15,000,000.

The amounts claimed by Valvision were in the view of the Arbitral Tribunal unjustifiably inflated, resulting unnecessarily in high fees having to be deposited with the ICC. This evaluation has had little effect on the amount of work which has had to be done, which has been considerable; therefore the Arbitral Tribunal believes that the Claimant should not recover from Vision N.V. the full amount of the advance on fees which it paid to the ICC (Final Award in case 5726 (1992), in ICC Bulletin, May 1993, page 63).

147. Vision N.V. must cover the ICC arbitration fees and costs up to the provision that had been fixed initially to cover the amount initially requested by Valvision and which corresponds to the amount finally granted by the Arbitral Tribunal, i.e. $135,000. As Vision N.V. and Vision B.V. have already advanced $67,500, the sole amount of $67,500 must be borne additionally by Vision N.V.

2. CSFB expenses

148. Valvision requests the reimbursement of £35,467.50 claimed by CSFB because one of its employees was subpoenaed to give testimony before the Arbitral Tribunal in England.

According to Article 20 of the ICC Rules, costs may comprise the normal legal costs incurred by the parties, which may include the travelling, accommodation and salary costs of witnesses of fact (ICC Bulletin, May 1993, page 32).

The amount requested by CSFB for the deposition of one witness does not appear to correspond to the definition of normal costs.

It was normal and justifiable for Valvision to request the appearance of CSFB's employee as a witness, as the arguments put forward by Valvision regarding the possible collusion between the Core Minority Shareholders and Vision N.V. and Vision B.V. on the existence of a potential kickback for Vision N.V. and Vision B.V. were not obviously without merit. CSFB refused to appear in court without being subpoenaed but the Arbitral Tribunal finds that the costs requested by CSFB in this respect are not reasonable. The Arbitral Tribunal therefore allocates £10,000 to Valvision to cover CSFB costs. However, should CSFB obtain a decision ordering Valvision to pay more than the amount awarded, Vision N.V. will have to indemnify Valvision in respect of the payment of any additional amounts that Valvision may be ordered to pay to CSFB.

3. Valvision lawyers' fees

149. Valvision requests an amount of €1,295,033.19 for attorneys' and consultants fees and costs incurred in relation to the arbitration from 1999 until July 30, 2001.

It appears from C.106 that Valvision instructed no less than 8 counsel in this case: Mrs. Ellen Bessis, Mr. Daniel Cohen, Mr. Carl Hartman, Mr. Paul Degroot, Slaughter & May London, Slaugher & May Paris, Mr. Nussenboom and Mr. Alan Sugarman. It would be unfair if Vision N.V. had to pay for any part of this duplication, and in assessing the cost to be paid by Vision N.V., the Tribunal has worked on the basis of Valvision instructing a reasonable number of lawyers (Final award in case 5726 (1992), ICC Bulletin, May 1993, page 36).

It must also be stressed that:

- the legal costs requested cover periods during which various proceedings were being held before the French courts,
- the copies of some invoices and specifications regarding some of the counsel cannot be fully read, contain many blanks and do not provide information as to the case for which the legal services were rendered,
- invoices from Valvision's counsel submitted by Valvision in this procedure were also addressed to a variety of recipients, different from Valvision.

The Arbitral Tribunal therefore concludes that Vision N.V. is to pay Valvision's lawyers' fees in an amount of €300,000.

§7. THE DECISION OF THE ARBITRAL TRIBUNAL CONCERNING THE SENTENCED PARTY

150. As indicated above, Valvision has filed its arbitral request against Vision N.V. and Vision B.V. and has generally referred to the Respondents in general or to "KPN".

In the Terms of Reference, however, Valvision has requested a ruling involving Vision N.V. only (see §30 above) and has not requested any damages from Vision B.V.

During the hearing held on 10 July 2001, Valvision confirmed, upon request of the Arbitral Tribunal, that the relief it requested had not been modified (see §35 above).

The Arbitral Tribunal will therefore limit its decision to sentencing Vision N.V. to pay damages to Valvision.

§8. TOTAL AMOUNT DUE

151. Vision N.V. therefore owes Valvision the following amounts:

- €6,806,817.71;
- ICC arbitration costs: €67,500;
- CSFB expenses: £10,000;
- Valvision's lawyers' fees: €300,000.

V. THE DECISIONS

152. For the foregoing reasons, the Arbitral Tribunal renders the following decisions:

1) Acknowledges that Valvision has in the Terms of Reference formulated relief requests towards Vision N.V. only and has confirmed that its requested relief had not been modified (see §35 above);

2) Therefore declares that Vision N.V. has breached its contract to sell the shares to Valvision;

3) Orders Vision N.V. to pay to Valvision:

   a. damages in the amount of €6,806,817.71;

   b. arbitration costs in an amount of $67,500 out of a total amount of arbitration costs of $336,000;

   c. CSFB expenses in an amount of £10,000, under the reservation that, should CSFB obtain a decision sentencing Valvision to pay more than the amount awarded, Vision N.V. will guarantee Valvision for the payment of any additional amount Valvision may be sentenced to pay to CSFB;

   d. Valvision lawyers' fees in an amount of €300,000;

4) Rejects any and all other claims submitted by Valvision;

5) Rejects Vision N.V. and Vision B.V.'s counterclaims.

Place of arbitration : London

Eric Morgan de Rivery

Arbitrator

Matthieu de Boisséson

Arbitrator

Jean-Marie Nelissen Grade

Chairman

Date of signature : 21st October 2002

CHAMBRE DE COMMERCE INTERNATIONALE
COUR INTERNATIONALE D'ARBITRAGE
INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE

A02338488/0.32a/17 Oct 2002

CERTIFIED TRUE COPY OF THE ORIGINAL

PARIS, 23 October 2002

Anne Marie WHITESELL
Secretary General
ICC International Court of Arbitration