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Envoyé : jeudi 12 avril 2012 13:41

À : UTIPULP members

Objet : RE: UTIPULP meeting - Agenda

Please find here attached a draft of the GTR to be discussed during our meeting. This proposal is the result of the inputs of Mondi, Burgo, Fedrigoni and Ahlstrom. There are some open points and alternatives for our debate and related comments. The purpose is to come to a more balanced document than today, possibly avoiding the Suppliers to argue that our request is too unbalanced in favor of the Buyer.

Best regards
Diego Borello

GENERAL TRADE RULES FOR WOOD PULP

1. PREAMBLE. – These General Trade Rules shall apply, except when altered by express agreement accepted in writing by both the seller and the buyer.

2. QUANTITY: WEIGHT AND MOISTURE. – Unless otherwise stated, the word tonne or ton in this contract shall mean 1,000 kilogrammes air-dry weight, gross for net. The term air-dry shall mean ninety per cent (90%) absolutely dry pulp and ten per cent (10%) water. The pulp shall be packed in bales of declared uniform weight and air-dry content or a specification to be given stating the weight and air-dry content and number of each bale. Each bale shall bear a number or other identification mark to enable the time of manufacture to be determined by the seller in case of need.

3. QUANTITY: MARGIN. QUANTITY MARGIN – A margin of +/- 10% of the contract quantity is allowed. This margin is calculated on the total contract quantity unless specified in a different way in a specific agreement

4. QUANTITY: DISPUTES ABOUT AIR-DRY QUANTITY. – (a) If the buyer shall dispute the air-dry content of the pulp invoiced, he must do so within a time limit of thirty (30) days after the discharge of the goods at the place of destination and base his claim on a test which must show a difference of more than one per cent (1%) in content of the air-dry pulp. That being the case he may submit his claim to the seller and at the same time furnish the seller with the details of the buyer's test and with at least two names of suitable and competent analysts. If at the time there exists a valid list of analysts approved by the trade associations of the parties, the analysts shall in the first place always be chosen from that list.

(b) If the parties fail to agree on the exact quantity within seven (7) days of the seller receiving the claim and the details of the test, a retest shall take place as soon as the

seller has chosen one of the proposed analysts. If the seller has not made his choice within fifteen (15) days of the receipt of the names, the buyer has the right to appoint one of the proposed analysts.

(c) The retest shall be made in accordance with existing ISO Recommendations or for grades not covered by such recommendations according to a method agreed on between buyer and seller. The seller shall have the right to be represented at the retest. Not less than one half (1/2) of the consignment in dispute shall be available for the retest otherwise no claim can be established. If the difference in net weight does not exceed one per cent (1%) as compared with the original invoice, the invoice shall stand as originally rendered. The analyst's findings shall be final and all expenses incidental to the retest shall be paid by the party in error.

(d) The buyer shall, however, in any case pay the invoice when due. Final adjustment shall be made when the retest is completed and according to the result of the same.

5. QUALITY. – (a) If the buyer shall dispute the quality of the pulp delivered, he must do so within the time limit of six (6) months after the discharge of the goods at the place of destination and within the same time state his claim as well as furnish the seller with the facts on which he is basing the said claim.

(b) If the buyer has made his claim as specified above and the parties cannot reach a settlement of the dispute, the matter shall be referred to arbitration. **Not less than sixty per cent (60%) of the consignment under dispute shall be available** for the drawing of samples, which can be determined by the arbitrators, otherwise no claim can be established. **[LEGAL : we should try to reject this minimum requirement of 60 %]**

(c) Should the pulp delivered be found on arbitration not to conform with the quality of the pulp according to the specification and/or sample sold on, but usable nevertheless by the buyer in his normal production, the arbitrators shall award an adequate allowance to the buyer, but should the pulp be found not so usable, the arbitrators shall award rejection. **The arbitrators shall, however, be entitled to award rejection only if eighty per cent (80%) or more is left of the consignment in question.** **[LEGAL : again we may want to eliminate the minimum of 80 %]**

(d) In the event of an award of rejection or of an allowance of twenty per cent (20%) or over of the c.i.f. value on account of quality having been made in favour of the buyer on two successive consignments of the same brand of pulp under this clause, the buyer has the right to cancel the balance of the contract if only one brand is contracted for, and, if more than one brand is contracted for, to cancel all future deliveries of the brand which is the subject of the award.

(e) The buyer shall promptly unload and properly store and cover by insurance any shipment made to the buyer pending a decision of the dispute.

(f) The buyer shall pay the invoice when due. In special cases, when the buyer can clearly demonstrate, the damages or the bad-quality of the pulp (i.e. forwarding samples or photos), the buyer will have the right to pay only for the amount corresponding to the pulp with right quality and conservation. For the rest the buyer has the right, to wait until the inspection or/and the statement of the seller on the dispute. In case there is not the possibility to achieve an agreement, but an arbitration is needed or (in alternative) the appointment of an expert, the buyer has the right to temporary suspend the last part of payment until the official results are disclosed.

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[LEGAL : arbitration is inadequate for quality claims; we could propose the appointment of an expert in the field of pulp (from CTPI for example) if we agree to keep this system and impose a maximum timeline for a final decision. Allotment of expert's fees should be equally shared or born the party "loosing" the matter]

6. DELAYED PAYMENT AND OWNERSHIP OF THE GOODS. – (a) If the buyer delays payment, each time it becomes due the seller shall be entitled to interest on such sum at a rate equal or above the official discount rate or the official minimum lending rate as appropriate to the country of the buyer.

[Comment: the last issue is not clear. It's better to eliminate. Often the place of invoice (valid in fiscal term) is different than the seller's or production country.]

(b) If the buyer is in default of payment for more than (14) days and the delay is not attributable to errors by transferring bank, the seller has the right to give an advise to the buyer for an immediate conclusion of the payment. Elapsed from this further notice, other (14) days, if the payment has not still reached the seller, this last one has the right to cancel the contract.

In the case of instalment contracts such cancellation applies to the balance of the contract including or not including, as the seller so elects, the shipment for which the buyer is in default of payment.

(c) Delivered pulp shall – to the extent permitted by the law of the buyer's country – remain the property of the seller until the whole sum payable under the contract is paid.
LEGAL : In negotiated contracts I generally refuse this retention of title clause since we need to have full title to the pulp upon delivery to be able to sell the final product without any retention of title clause (see our general terms of sale) *[Comment: I agree with the LEGAL comment. It's better to eliminate the sentence.]*

(d) Should the buyer default in making any payment under the terms of the contract, the seller shall have the right to withhold deliveries until payment upon giving reasonable-
[Comment: I agree. notice to that effect to the buyer.]

(e) Subject to public policy provisions, should the buyer or the seller become insolvent or go into liquidation or have a receiver appointed or otherwise be found to be in such financial position that it may reasonably be assumed that he will not be able to fulfil his obligations, the other party shall have the right to cancel the contract if the first party has not within ten (10) days after given notice furnished a satisfactory guarantee for his fulfilment of the contract.

[LEGAL : according to French Commercial Law, a supplier to a party going into receivership cannot unilaterally decide to cease supplying: it's a matter of public order.]

[Comment: I haven't details about this specific issue. I think the comment makes more sense if related to the case of public and security problems. May be related to these concerns, the pulp business?]

(f) Invoice. The Seller indicates to the Buyer all the details and data regarding the invoice. If the Seller issue an invoice from one of its Companies or Subsidiaries located in countries mentioned in the "black list" document (government official list existing in each country), the Buyer has the right to have by the Seller, a different suitable place of invoicing, in consideration of the very delicate fiscal consequences that these circumstances should have for the Buyer.

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7. LIMITATION OF DAMAGES. – (a) If the pulp delivered is found lacking in quality and a rejection of the faulty pulp is agreed or awarded by arbitration, the seller is under the obligation without undue delay to replace the faulty pulp at his own expense and reimburse the expenses the buyer may have incurred in receiving, storing and reloading the faulty pulp.

In the event the product supplied does not meet the specification and in the reasonable opinion of the buyer the difference in specification/quality is critical enough for the buyer not to proceed with production, the buyer and the seller will explore the alternative options for the seller to replace the non conforming product with appropriate product to enable the buyer to proceed with production. If in the opinion of the buyer the supplier's proposal is unacceptable then the buyer may make alternative arrangements for sourcing alternative comparable products. In either scenario the supplier will pay compensation to the buyer to cover additional costs incurred.

(b) When either party is liable for damages to the other, these shall not exceed the loss, which the party in fault could reasonably have foreseen at the time of the conclusion of the contract nor include consequential damages.

(c) If one party alleges a breach of contract by the other party, he must take all necessary measures to mitigate the loss resulting from the breach, provided that and in so far as he can do so without unreasonable inconvenience or cost. If he fails to take such measures, the party in breach may claim a reduction in the damages. An alleged breach of the of the contract must be communicated to the other party in a timely manner

8. RELIEFS (force majeure). – (a) The following shall be considered as cases of relief if they intervene after the conclusion of the contract – or when they have occurred before that time, if their effects were not clearly foreseeable before the conclusion – and they prevent, hinder or delay the buyer's production or acceptance of the pulp or the seller's production or delivery by agreed means of pulp; viz.: war; war risk; insurrection; blockade; requisition; embargo;; currency restrictions; export or import prohibitions or restrictions; restriction in the use of power;; general shortage of transport and materials; water shortage; fire; flood; storm; obstruction of railways; obstruction of navigation by ice at port of shipment; loss or detention at sea; non delivery; and any other circumstances beyond the control of the parties. [LEGAL : labour conflicts is a very general wording which may include small disputes or strikes ;so far it has been used by pulp suppliers to excuse delays or stops in shipments; I suggest to delete this case of relief]

(b) The buyer or the seller, as the case may be, may suspend performance under this contract on the grounds of relief, neither party being responsible to the other party for any damage resulting from such suspension.

Shipment in transit from seller's mills must, however always be accepted by the buyer.

(c) In the event of suspension of performance for less than twenty (20) consecutive days, shipments shall be resumed as soon as practicable for the full contract quantity. When such suspension shall have continued for a period of twenty (20) consecutive days or more, the shipment omitted during the period of suspension can be cancelled without liability to either party, and subsequent shipments shall be resumed thereafter according to contract.

(d) The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing, by email or by fax without delay on the occurrence of the intervention and on the cessation thereof and, as soon as practicable, notify the other party to what extent the claim will necessitate a suspension.

9. DELAYED SHIPMENT CAUSED BY LATE ARRIVAL OF SHIP. – Notwithstanding anything contained herein, in the event of a vessel which has been chartered in accordance with the terms hereof being delayed in arriving at the port of loading for a period not exceeding seven (7) days after the expiry of the time of shipment provided by this contract, the seller shall immediately inform the buyer thereof and take all steps, at its sole cost, to deliver the goods within the agreed delivery time, from another port or warehouse. Should seller fail to comply with the aforementioned for any reason whatsoever, buyer shall be entitled to cancel its order and buy goods elsewhere, the seller being responsible for all extra costs involved as well as any damages costs and expenses of whatsoever nature (including but not limited to special, indirect, incidental consequential damages) and related legal fees, suffered by the buyer.

[LEGAL : I suggest to simply delete this paragraph which is an open window to price increases]

11. CLAIMS. – All claims must be made in writing, by email or by fax within six (6) months (except claims for payment of the invoice) after the discharge of the goods at the place of destination. No claims sent after the time shall be recognized.

12. SHIPMENTS. – Each shipment under this contract shall be considered as a separate contract and default on one or more shipments shall not invalidate the balance of the contract except as herein otherwise provided. The present clause does not, however, affect the applicability of the clauses 3 and 10 above.

13. COMPLIANCE WITH LAWS

Seller shall at all times comply with all laws, rules, regulations and ordinances applicable to the goods, including but not limited to, all fair labor, equal opportunity, **civil and human rights**, and environmental compliance laws, rules, regulations and ordinance, including but not limited to the LACEY ACT and Regulation 995/2010 of the European Parliament. Seller shall furnish to buyer any information required to enable buyer to comply with any applicable laws, rules, and regulations in its use of the goods. Notwithstanding anything contained herein, Seller shall indemnify and hold harmless buyer, its affiliates, agents, employees and customers from and against all suits, claims, demands, liabilities, losses, damages, judgments, costs and expenses of whatsoever kind or nature (including but not limited to special, indirect, incidental consequential damages) and related legal fees, arising from a breach of the seller's warranty pursuant to this section.

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14. APPLICABLE LAW. – The contract and the legal relations between the buyer and the seller shall be governed by the laws of Belgium .

Alternative: the law of the buyer's country. It's quite normal that the priority is on the buyer's rights.

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15. ARBITRATION. – All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one of more arbitrators appointed in accordance with the Rules. The place of arbitration shall be Bruxelles, Belgium and the arbitration proceedings shall be conducted in the English language.

| *Note: it is very common Paris or Vienna. Why not?*

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