

CASE NO. 125

(Arbitral Award of 6 October 2016)

The CIF terms of the Contract obliged the Respondent to arrange the marine insurance and freight. Under the CIF terms, the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination BUT the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. Given, however, that the shortage was discovered in the circumstances of the untouched and safe seals and stamps on the container, the Arbitral tribunal is mindful to attribute the shortage to the failure of the Respondent.

*

*

*

The ICAC at the UCCI composed of three arbitrators (hereinafter referred to as the “Arbitral Tribunal”) held a hearing in the case under claim of the Ukrainian LLC against the Chinese company for the recovery of USD 3,928.40.

The legal basis for the resolution of the dispute at the ICAC at the UCCI is the arbitration clause contained in paragraph 9 of the Contract dated 28 December 2015.

The parties failed to specify the law applicable to the Contract.

Taking into consideration that the agreement between the Claimant and the Respondent is an international sale and purchase agreement and the places of business of the Claimant and the Respondent are in different States (Ukraine and China respectively) which are Contracting States, it shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) (hereinafter referred to as the “CISG”), as it is set out in Article 1 (1) (a) of the CISG. Indeed, Ukraine ratified the CISG on 1 February 1991 and China – on 11 December 1986.

FACTUAL BACKGROUND OF THE CASE

The Ukrainian LLC, the Claimant, filed the Statement of Claim with the ICAC at the UCCI for recovery of the amount of USD 3,928.40 from the Chinese company, the Respondent.

The claims of the Claimant are based on the Contract dated 28 December 2015 (hereinafter referred to as “the Contract”), according to which the Respondent is to sell and the Claimant is to buy the goods specified in the Specification No. 1 (as an integral part of the Contract) based on the CIF delivery terms Odessa/Ukraine in accordance with INCOTERMS 2010 in quantities and at the price pursuant to the Specification.

As appears from the Statement of Claim, the Claimant transferred to the Respondent an advance payment amounting to USD 11,500.00: 30% amounting to USD 3,450.00 on 30 December 2015, 70% amounting to USD 8,050.00 on 10 March 2016.

On 7 March 2016 the Respondent dispatched a container with the goods weighing 25,000 kg (quantity in compliance with the specification) at the address of the Claimant based on a bill of lading.

On 15 April 2016 the container arrived at the port of Odessa, where the representative of Odessa customs of the State Fiscal Service of Ukraine conducted an examination and found that the container arrived in good condition and with intact seals of the consignor, in witness whereof an act was executed.

On 18 April 2016, the container was delivered by a transportation company to the Claimant. In the process of opening the container with the participation of representatives of the independent SGS expert company and customs authorities, it was determined that the actual weight of the goods amounts to 16,460 kg, which was confirmed by the report of the inspection dated 14 April 2016. The value of the goods delivered is USD 7,571.60.

The Claimant submits that the Respondent, in violation of the contractual provisions, failed to deliver to the Claimant goods to the value of USD 3,928.40, being the difference between the value of the goods paid for (USD 11,500.00) and the value of the goods actually delivered (USD 7,571.60).

On 22 April 2016 the Claimant sent to the Respondent by e-mail a report from the SGS company and a request to return USD 3,928.40. Since then, the Respondent stopped communication and, so far, the value of the undelivered goods was not returned to the Claimant.

In light of the breach of contractual obligations under the Contract with regard to delivery of the goods, the Claimant requests to recover the principal debt amounting to USD 3,928.40 and the arbitration charges and expenses incurred by the Claimant from the Respondent.

On 9 June 2016 the present arbitral proceedings were commenced by the Decision of the President of the ICAC at the UCCI.

Upon the constitution of the Arbitral Tribunal and the preparation of the case for consideration, the oral hearing of the case was scheduled for 6 October 2016.

The Respondent did not utilize his right to submit written explanations (Statement of Defence) according to Article 21 of Rules of ICAC at the UCCI.

At the hearing the Claimant's representative affirmed the claims and requested to grant them in full.

The Respondent failed to participate, despite having been duly notified on the date, time and place of the hearing by the summons.

REASONS FOR AWARD

1. The Claimant's claim as to the recovery of debt should be granted in full in the amount of USD 3,928.40 on the following basis.

2. In performance of its contractual obligations under the Contract, the Claimant transferred to the Respondent an advance payment amounting to USD 11,500.00: 30% amounting to USD 3,450.00 on December 30, 2015, and 70% amounting to USD 8,050.00 on March 10, 2016, as confirmed by bank statements.

3. The obligation to deliver the goods specified in the Specification No. 1 to the Contract has arisen on the basis of clause 4.1.1. of the Contract within 20 days after receiving 30% prepayment in accordance with INCOTERMS 2010 in quantities and at the price pursuant to the Specification. Subject to the Specification No. 1, the Respondent had to deliver 25 tons +/- 10% of cold rolled steel at the price USD 460.00 per ton; the total value on CIF Odessa/Ukraine is USD 11,500.00.

4. In turn, SGS, which is an inspection, verification, testing and certification company, carried out an inspection on the territory of the Claimant. According to the inspection report of SGS, the actual weight of delivered products was 16,460 kg. The value of the delivery was USD 7,571.60 received by the Claimant. The representatives of the independent SGS expert company and customs authorities participated in the process of opening the container. The amount thus delivered was subjected to customs clearance as confirmed by the customs declaration.

5. The CIF terms of the Contract obliged the Respondent to arrange the marine insurance and freight. Under the CIF terms, the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of

destination BUT the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. Given, however, that the shortage was discovered in the circumstances of the untouched and safe seals and stamps on the container, the Arbitral tribunal is mindful to attribute the shortage to the failure of the Respondent.

6. In the letter dated 24 May 2016 the Claimant informed the Respondent that the quality of the goods delivered was not satisfactory, and that the Respondent made a mistake with regard to the weight of the goods delivered. Besides, in that letter the Claimant proposed that the Respondent returns the prepayment.

7. According to Article 30 of the CISG, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the CISG. According to Article 35 (1) of the CISG, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

8. Pursuant to the case materials, the Respondent in breach of contract failed to deliver goods in quantities specified in the Contract and Specification No. 1 to the Contract.

Moreover, the Respondent failed to carry out its obligations under the Contract concluded on CIF delivery terms in accordance with INCOTERMS 2010.

9. In turn, Article 45 (1) of the CISG states that if the seller fails to perform any of his obligations under the contract or the CISG, the buyer may: (b) claim damages as provided in articles 74 to 77.

According to Article 74 of the CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

10. Therefore, the debt in the amount of USD 3,928.40 is to be recovered from the Respondent on the basis of Articles 45 and 74 of the CISG.

11. The Respondent is to bear arbitration charges and expenses in particular, the arbitration fee and payment for translation of documents into

English by the ICAC at the UCCI according to Section VI of the Schedule of Arbitration Fees and Costs.

Based on the above, the Arbitral Tribunal recovered from the Chinese company in favour of the Ukrainian LLC USD 3,928.40 of the debt, as well as USD 1,800.00 of arbitration costs and USD 400.00 for the performance of translations of documents of the ICAC at the UCCI into the English language.